SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 623

FRED S. CALHOUN, ET AL., PETITIONERS,

vs.

A. C. LATIMER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 14, 1963

CERTIORARI GRANTED JANUARY 13, 1964

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[fol. 1] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 6298

VIVIAN CALHOUN, CORNETHA CALHOUN, and FRED CALHOUN, infants, by WILLIE CALHOUN, their father and next friend;

CORNELL HARPER, JESSIE LEE HARPER, BETTY JEAN HARPER, and FRANK HARPER, infants, by HENRY L. HARPER, their father and next friend;

LEANARD JACKSON, JR., CECELIA JACKSON, PHYLLIS JACKSON, and REBA JACKSON, by LEANARD JACKSON, SR., their father and next friend;

BETTY JEAN WINFREY, JENNING WINFREY, MELVIN WINFREY, SHARON WINFREY, and DORIS WINFREY, by ROOSEVELT WINFREY, their father and next friend;

JUANITA FEARS, and JOHNNY FEARS, by JOHNNY FEARS, SR., their father and next friend;

ONITHIA PUTNAM, and CLOUD PUTNAM, by DOCK PUTNAM, their father and next friend;

ERNEST SWANN, and CHARLES SWANN, by RALPH SWANN, their father and next friend;

JAMES LESTER, and WILLIAM LESTER, by DAVID LESTER, their father and next friend;

SANDRA MCDOWELL, and SNOWDRA MCDOWELL, by HUDIE MCDOWELL, their father and next friend;

DELANE JENKINS, and MARION JENKINS, by Mrs. RUTH [fol. 2] SMITH, formerly Mrs. RUTH JENKINS, their mother and next friend, Plaintiffs,

v.

A. C. LATIMER, ED. S. COOK, ALLEN L. CHANEY, JR., RUFUS E. CLEMENT, L. J. O'CALLAHAN, OBIE T. BREWER, GLENN FRICK, Mrs. CLIFFORD N. RAGSDALE, HARALD JACKSON,

As members of the Board of Education of the City of Atlanta,

And, Miss IRA JARRELL, SUPERINTENDENT OF THE PUBLIC SCHOOLS OF THE CITY OF ATLANTA, Defendants.

COMPLAINT—Filed January 11, 1958

1. The jurisdiction of this court is invoked pursuant to the provisions of Title 28, United States Code, Section 1343 (3), this being a suit in equity authorized by law, Title 42, United States Code, Section 1983, to be brought to redress the deprivation under color of state statute, ordinance, regulation, custom or usage of rights, privileges and immunities secured by the Constitution and laws of the United States or by any act of Congress providing for the equal rights of citizens. The rights here sought to be protected are rights secured by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States and Title 42, United States Code, Section [fol. 3] 1981.

2. This is a proceeding for a preliminary and permanent injunction enjoining defendants from operating the public school system of the City of Atlanta, Georgia on a racially segregated basis.

3. This is a class action brought by the adult plaintiffs for the minor plaintiffs on behalf of themselves and on behalf of other adults and minors similarly situated, pursuant to the provisions of Rule 23 (a)(3) of the Federal Rules of Civil Procedure. The members of this class are all adult Negro citizens and their minor children of the State of Georgia who reside in the City of Atlanta, Georgia. The minors are all eligible to attend the public schools

of Atlanta, Georgia. The members of this class are all similarly affected by the action of the defendants in maintaining and operating the public school system of Atlanta, Georgia on a racially segregated basis.

4. The adult plaintiffs in this case are all citizens of the United States and of the State of Georgia, residing in the City of Atlanta, Georgia. Each adult plaintiff is the parent of one or more minor children who are eligible to attend the public schools, under the control of the defendants. Each minor plaintiff is likewise a citizen of the United States and of the State of Georgia, residing in the City of Atlanta, Georgia.

5. The adult and minor plaintiffs are respectively: Wil- [fol. 4] lie Calhoun, Vivian Calhoun, Cornetha Calhoun, and Fred Calhoun; Henry L. Harper, Cornell Harper, Jessie Harper, Betty Jean Harper, and Frank Harper; Leanard Jackson, Sr., Leanard Jackson, Jr., Cecelia Jackson, Phyllis Jackson, and Reba Jackson; Roosevelt Winfrey, Betty Jean Winfrey, Jenning Winfrey, Melvin Winfrey, Sharon Winfrey, and Doris Winfrey; Johnny Fears, Juanita Fears, and Johnny Fears, Jr.; Dock Putnam, Onithia Putnam, and Cloud Putnam; Ralph Swann, Ernest Swann, and Charles Swann; David Lester, James Lester, and William Lester; Hudie McDowell, Sandra McDowell, and Snowdra McDowell; Mrs. Ruth Smith, formerly, Mrs. Ruth Jenkins, Delane Jenkins, and Marion Jenkins.

6. The defendants, A. C. Latimer, Ed. S. Cook, Allen L. Chaney, Jr., Rufus E. Clement, Obie T. Brewer, Glenn Frick, Mrs. Clifford N. Ragsdale, and Harald Jackson are members of the Board of Education of the City of Atlanta, and as such, hold office pursuant to the laws of the State of Georgia. The defendant, Miss Ira Jarrell, is the duly appointed and acting superintendent of the public schools of Atlanta, Georgia. She is the chief administrative officer of the public school system of Atlanta, Georgia, and holds office pursuant to the laws of the State of Georgia, subject to the control and authority of the Board of Education of the City of Atlanta, Georgia.

7. The Board of Education of the City of Atlanta exists pursuant to the Constitution of the State of Georgia, and

[fol. 5] the laws of the State of Georgia, as a governmental agency of the State of Georgia, charged with the governmental function of establishing, maintaining and operating the public school system of the City of Atlanta, Georgia.

8. The public schools of the City of Atlanta, Georgia are under the direct supervision and control of the defendants, as members of the Board of Education of the City of Atlanta.

9. Acting under color of their authority and under color of the laws of the State of Georgia, the defendants are presently operating the public school system of Atlanta, Georgia on a racially segregated basis, pursuant to the policy, custom, usage, regulations and laws of the State of Georgia of enforcing racial segregation in public institutions. Pursuant to the policy, custom, usage, laws and regulations of racial segregation in public institutions, defendants have designated certain schools of the public school system of Atlanta, Georgia as schools for the exclusive attendance of white children and other schools for the exclusive attendance of Negro children. Schools for the exclusive attendance of white children are staffed by white teachers, principals and administrative personnel only. Schools for the exclusive attendance of Negro children are staffed by Negro teachers, principals and administrative personnel only. The minor plaintiffs and other minor Negro pupils similarly situated are required to attend the [fol. 6] schools designated for the exclusive attendance of Negro pupils and are not permitted to attend schools designated for the exclusive attendance of white pupils, solely on account of their race and color.

10. The adult plaintiffs on their own behalf and on behalf of their children attending the public schools of the City of Atlanta have intermittently filed, since about June 3, 1955 through September, 1956 written petitions with the Atlanta Board of Education, and Miss Ira Jarrell, Superintendent of Schools, in which the plaintiffs petitioned the said Superintendent of Schools, and the Atlanta Board of Education to reorganize the public schools of the City of Atlanta on a racially non-segregated basis, in compliance with the United States Supreme Court's decisions of May 17, 1954, and May 31, 1955 in the case of Brown v.

Board of Education of Topeka. That the defendants, members of the Board of Education of the City of Atlanta, Georgia, and the said defendant, Superintendent of Schools of the City of Atlanta have failed and refused to desegregate the schools within their jurisdiction and control. That said defendants have since continued to operate the public schools aforesaid on a racially segregated basis; that the defendants have failed and refused to make an official declaration of their intent to desegregate and cease operating the public schools of the City of Atlanta, Georgia on a racially segregated basis.

[fol. 7] 11. The operation of the public school system of Atlanta, Georgia on a racially segregated basis, as hereinabove set forth, deprives the minor plaintiffs and other minor Negro pupils similarly situated of equal educational opportunities in violation of rights secured to them by the equal protection clause of the Fourteenth Amendment to the Federal Constitution and by Title 42, United States Code, Section 1981. The operation of the public school system of Atlanta, Georgia, on a racially segregated basis consequently results in irreparable injury to minor plaintiffs and other minor pupils similarly situated. There is no complete, adequate or speedy remedy at law to compensate the minor plaintiffs for the injury which they are presently sustaining as a result of the operation of the public school system of Atlanta on a racially segregated basis.

Wherefore, plaintiffs pray:

1. That proper process may issue and be directed to each of said defendants, herein named, requiring them to appear and answer this complaint;

2. That upon the filing of this complaint, this court will advance this case on the docket and order a speedy hearing thereof according to law;

3. That this court will issue a preliminary injunction pending the final disposition of this case and a permanent injunction upon the final determination of this cause enjoining the defendants from operating the public school [fol. 8] system of Atlanta, Georgia on a racially segregated basis and enjoining the defendants from refusing to

permit the minor plaintiffs to attend any public school in the City of Atlanta, Georgia, which they are otherwise qualified to attend, solely because of their race and color.

4. That this court allow plaintiffs their costs herein, and grant such further, other or additional relief as to the court may appear just and proper in the premises.

E. E. Moore, Jr., 175 Auburn Ave., N.E., Atlanta, Georgia.

Constance Baker Motley, Thurgood Marshall, 107 West 43rd Street, New York, N. Y.

[fol. 9]

IN UNITED STATES DISTRICT COURT

ANSWER

Now come the defendants and answer the complaint as follows:

1.

So much of paragraph 1 as alleges that jurisdiction of the court is invoked pursuant to Title 28, U. S. C. A. §1343(3) and Title 42 U. S. C. A. §1983 does not set forth facts and therefore requires no answer. The remainder of said paragraph and so much of said paragraph as sets forth allegations of fact are denied.

2.

Paragraph 2 does not allege facts and requires no answer.

3.

Paragraph 3 is denied.

4.

For want of information sufficient to form a belief, defendants can neither admit nor deny the allegations of paragraph 4.

5.

Paragraph 5 is admitted.

6.

Answering paragraph 6, defendants admit that the defendants therein named as members of the Board of Edu-
[fol. 10] cation of the City of Atlanta are members of said Board of Education, and that Miss Ira Jarrell is Superintendent of Schools of the City of Atlanta, and is the chief administrative officer of the Board of Education. The remainder of said paragraph does not allege facts, but conclusions of law, and requires no answer. Insofar as said paragraph alleges facts other than those hereinabove admitted, such facts are denied.

7.

Answering paragraph 7, defendants say that said paragraph sets forth and alleges matters of law, not matters of fact, and requires no answer. Insofar as the paragraph does allege facts, they are denied.

8.

Paragraph 8 is admitted. Further answering paragraph 8, defendants say that the public schools of the City of Atlanta are dependent for financial support upon State funds appropriated by the General Assembly of Georgia, without which the schools cannot be operated.

9.

Paragraph 9 is denied. Further answering said paragraph, defendants say that the school children in the City of Atlanta customarily attend schools in the neighborhoods in which they reside and the enrollment of students in the schools they attend is now and for many years has been on a neighborhood basis. This practice has devel-
[fol. 11] oped over a long period of years during the tenure of predecessors in office of the defendants, and without direction on the part of school officials, and without any idea of discrimination against white children or Negro children on account of race or color, or otherwise; and is in accordance with the wishes, as well as the habits and customs, of the vast majority of the citizens of both races.

10.

Paragraph 10 is denied. Further answering said paragraph, these defendants say that the defendants Chancy, Brewer, Frick, Jackson and O'Callahan did not become members of the Board of Education of the City of Atlanta until January 1, 1958. They say that certain petitions purporting to come from Negro residents of the City of Atlanta have, subsequent to June 1, 1955, been filed with the Board of Education or with the Superintendent of Schools, but such petitions complained of no act or thing done by the Board of Education or the Superintendent to any individual with respect to any particular school or otherwise.

11.

Paragraph 11 is denied.

12.

For further answer, defendants say that none of the minor plaintiffs has ever applied for admission to any school other than that he or she has attended or is attending; and no one of said minor plaintiffs has ever applied [fol. 12] for admission to any school attended by white students. On the contrary, each of said minor plaintiffs has regularly enrolled in the school he or she has attended or is now attending. None of said minor plaintiffs has ever been denied admission to any school on account of race or color, or for any other reason.

Wherefore, these defendants pray that the relief sought be denied and that they be discharged with their reasonable costs.

J. C. Savage, Newell Edenfield, B. D. Murphy, Powell Goldstein Frazer & Murphy, Attorneys for Defendants, The Citizens and Southern National Bank Building, Atlanta 3, Georgia.

[fol. 13]

IN UNITED STATES DISTRICT COURT

ORDER OF COURT—July 9, 1959

This cause having come on for trial on the 5th day of June, 1959 and the Court having made and filed on the 16th day of June, 1959 its Opinion, Findings of Fact and Conclusions of Law, and based upon such Opinion, Findings of Fact and Conclusions of Law, it is now Ordered:

1. That the defendants and each of them, their agents, employees, successors in office, and all persons in active concert and participation with them be, and they hereby are, enjoined from enforcing and pursuing the policy, practice, custom, and usage of requiring or permitting racial segregation in the operation of the public schools of the City of Atlanta, and from engaging in any and all action which limits or affects admission to, attendance in, or education of, infant plaintiffs, or any other Negro children similarly situated, in schools under defendant's jurisdiction, on the basis of race or color:

Provided That, defendants will be allowed a reasonable period of time to achieve full compliance with this Order and for bringing about a transition to a school system not operated on the basis of race;

Provided Further That, defendants are herewith directed to present to this Court, on or before the first day of December, 1959 a complete plan, adopted by them, which [fol. 14] is designed to bring about compliance with this Order, and which shall provide for a prompt and reasonable start toward desegregation of the public schools of the City of Atlanta and a systematic and effective method for achieving such desegregation with all deliberate speed. Such plan may be submitted contingent upon the enactment of statutes permitting such plan to be put into operation.

2. That following the filing of defendants' plan with this Court, a further hearing will be held in this cause, at which time the defendants may offer such evidence and arguments as they may desire in support of said plan and the plaintiffs may offer such evidence and arguments with respect to the plan as they may be advised to present.

3. This Judgment of the Court is not a final Judgment in the case and the Court retains jurisdiction of this cause for the purpose of entering such further orders or granting such further relief as may be necessary to bring about compliance with this decree and during such time as may be necessary to put into effect the defendants' plan.

This the 9th day of July, 1959.

Frank A. Hooper, United States District Judge.

[fol. 15]

IN UNITED STATES DISTRICT COURT

DEFENDANTS' PLAN OF DESEGREGATION—
Filed December 1, 1959

Now come the defendants and in compliance with the order of the Court, entered in the above stated case on June 16, 1959, submit a proposed plan for the placement of pupils in the Atlanta School System, adopted by the Board of Education of the City of Atlanta by unanimous vote on November 30, 1959.

Said plan is, as is provided by the order of the Court, contingent upon the enactment of statutes by the General Assembly of Georgia permitting the same to be put into operation.

Respectfully submitted,

J. C. Savage, Newell Edenfield, B. D. Murphy, Attorneys for Defendants.

*****

Whereas, The Atlanta Board of Education has been directed to present to the Court by December 1, 1959, a plan designed to bring about compliance with the order of the Court of July 9, 1959; and

Whereas, The Atlanta Board of Education is making [fol. 16] every effort to provide the Atlanta Public School System with the very best buildings, equipment, and other facilities and curricula for approximately 116,000 students; and

Whereas, The City of Atlanta is undergoing rapid urbanization, bringing an influx of children of varying degrees of achievement and ability due not only to individual aptitude but to educational opportunities heretofore available; and

Whereas, There is and has been much public construction in Atlanta, which together with other building has resulted in drastic changes in neighborhood patterns, and these changes will be greatly magnified by the proposed slum clearance program involving the vacating of more than 1,200 acres of land with the resultant displacement of families; and

Whereas, These factors result in not only a continuous influx of new students into the system, but in the continuous movement of students within the system, and also from the system into the suburban areas adjoining Atlanta; and

Whereas, The changing neighborhood patterns, the 39 million dollars worth of new school construction since 1948, the great influx of new students, and the continuous movement of students within the system has caused admission, assignment, transfer, and continuance of students in and to the various schools within the system to become a major [fol. 17] problem of the administration; and

Whereas, Pending further studies and recommendations by the school authorities, the Board of Education considers that any general or arbitrary reallocation of pupils heretofore entered in the public school system according to any rigid rule of proximity of residence or in accordance solely with requests on behalf of pupils would be disruptive to orderly administration, and would tend to invite or induce disorganization and would impose an excessive burden on the available resources as well as the teaching and administrative personnel of the schools; and

Whereas, In September, 1960, there will be a shortage of 580 classrooms in Atlanta schools and many children are now on double sessions, housed in churches and facilities other than classrooms, and the Board realizes that continuous system-wide studies must be made to determine avail-

able seats for students and studies of achievement and ability of the students where these seats may exist as well as other factors consistent with the educational policies governing the admission, assignment, transfer, and placement of pupils in the public schools as will be prescribed in this document; and

Whereas, The State Board of Education has not promulgated rules and regulations relative to the placement of students in the schools, and this Board has the inherent power of pupil placement, and more complete regulations [fol. 18] are necessary

Now Therefore: To insure orderly procedures of uniform application for pupil assignment, transfer and/or placement, and to enable the continuing improvement of the educational advantages offered, the following rules and procedure shall be followed:

1. In the assignment, transfer or continuance of pupils among and within the schools, or within the classroom and other facilities thereof, the following factors and the effects or results thereof shall be considered, with respect to the individual pupil, as well as other relevant matters: Available room and teaching capacity in the various schools; the availability of transportation facilities; the effect of the admission of new pupils upon established or proposed academic programs; the suitability of established curricula for particular pupils; the adequacy of the pupil's academic preparation for admission to a particular school and curriculum; the scholastic aptitude and relative intelligence or mental energy or ability of the pupil; the psychological qualification of the pupil for the type of teaching and associations involved; the possibility of threat of friction or disorder among pupils or others; the possibility of breaches of the peace or ill will, or economic retaliation within the community; the effect of [fol. 19] admission of the pupil upon the academic progress of other students in a particular school or facility thereof; the effect of admission upon prevailing academic standards at a particular school; the psychological effect upon the pupil of attendance at a particular school; the

home environment of the pupil; the maintenance or severance of established social and psychological relationships with other pupils and with teachers; the choice and interests of the pupil; the ability to accept or conform to new and different educational environment; the morals, conduct, health and personal standards of the pupil; the request or consent of parents or guardians and the reasons assigned therefor.

2. Subject to supervision and review by the Board, the City Superintendent of Schools shall have authority and be charged with responsibility with respect to the assignment (including original and all other admissions to the school system), transfer and continuance of pupils among and within all public schools operated under the jurisdiction of the Atlanta Board of Education.

3. The Superintendent shall have authority to determine the particular public school to be attended by each child applying for assignment or transfer, and no child shall be entitled to be enrolled or entered in a public school until he has been assigned thereto by the Superintendent [fol. 20] or his duly authorized representative. All existing school assignment shall continue without change until or unless transfers are directed or approved by the Superintendent or his duly authorized representative.

4. Between June 1st and June 15th applications for the admission, assignment or transfer, and/or placement of pupils to or in particular schools shall be directed to the Superintendent of Schools and shall be delivered to the school principal unless otherwise directed by the Superintendent on forms provided by the Superintendent, and made available at the offices of the Board of Education. Such forms shall be delivered only on request of and to the applicant student or to his parent or legal guardian, in person, by the principal of the school then attended by such student or by the Superintendent of Schools.

5. A separate application must be filed for each pupil desiring assignment or transfer to a particular school and no joint application will be considered.

6. Applications for assignment or transfer of pupils must be filled in completely and legibly in ink or typewriter and must be signed by both parents or the parent to whom the child has been awarded by court proceedings, or the legal guardian of each child for whom application [fol. 21] is made. Further, the application must be notarized at the time it is filed. Notice of the action taken on each application shall be mailed to the parents or guardian, at the address shown on the application, which shall be final, unless a hearing before the Board is requested in writing fifteen days from the date of mailing such statement.

7. The Superintendent may in his discretion require interviews with the child, the parents or guardian, or other persons and may conduct or cause to be conducted such examinations, tests and other investigations as he deems appropriate. In the absence of excuse, satisfactory to the Superintendent or the Board, failure to appear for any requested examination, test or interview by the child or the parents or guardian will be deemed a withdrawal of the application.

8. A parent or guardian of a pupil may file in writing with the Atlanta Board of Education objections to the assignment of the pupil to a particular school, or may request by petition in writing assignment or transfer to a designated school or to another school to be designated by the Board. Unless a hearing is requested, or unless the Board deems a hearing necessary, the Board shall act upon the same within a reasonable time stating its conclusion. If a hearing is requested or if the Board deems [fol. 22] a hearing necessary with respect to the Superintendent's conclusion on an application, the parents or guardian will be given at least five days' written notice of the time and place of the hearing. The hearing will be begun within thirty days from the receipt by the Board of the request. Failure of the parents or guardian to appear at the hearing will be deemed a withdrawal of the application.

9. The Board may conduct such hearing or may designate not less than three of its members to conduct the

same and may provide that the decision of the members designated or a majority thereof shall be deemed a final decision by the Board. The Board of Education may designate one or more of its members or one or more competent examiners to conduct any such hearing, take testimony, and report the evidence, with his recommendation, to the entire Board for its determination. In addition to hearing such evidence relevant to the individual pupil as may be presented on behalf of the petitioner, the Board shall be authorized to conduct investigations as to any objection or request, including examination of the pupil or pupils involved, and may employ such agents and others, professional and otherwise, as it may deem necessary for the purpose of such investigations and examinations. No final order shall be entered in such case until each member [fol. 23] of the Board of Education has considered the entire record.

10. Unless postponement is requested by the parents or guardian, the Board will notify them of its decision within twenty days after the conclusion of the hearing. Exceptions to the decision of the Board may be filed, within five days of notice of the Board's decision, and the Board shall meet within fifteen days of the receipt of the exceptions to consider the same. Any person dissatisfied with the final decision of the Board may appeal to the State Board of Education as provided by law.

11. If, from an examination of the record made upon objections filed to the assignment of any pupil to a particular school, or upon an application on behalf of any pupil for assignment to a designated school, or another school to be designated by the Board, or from an examination of such pupil by the Board or its authorized representative, or otherwise, the Board shall determine that any such pupil is between his or her seventh and sixteenth birthdays and is mentally or physically incapacitated to perform school duties, or that any such pupil is more than sixteen years of age and is maladjusted or mentally or otherwise retarded so as to be incapable of being benefited by further education to the extent that further use of public funds for the education of such

[fol. 24] pupil is not justified, the Board may assign the pupil to some available vocational or other special school, or terminate the public school enrollment of such pupil altogether.

12. Beginning September 1, 1960, or on September 1, following favorable action by the General Assembly of Georgia, student assignment in the Atlanta Public School System shall be made in accordance with aforesaid rules and regulations and without regard to race or color. For the first school year in which it is effective, the plan shall apply to the students in the 12th grade. Thereafter, in each successive year, the plan shall be expanded to the immediate lower grade; e.g., in 1961-62—grade 11, in 1962-63—grade 10, etc., until all grades are included.

13. Nothing contained in this resolution shall be construed to prevent the separation of boys and girls in any school or grade, or to prevent the assignment of boys and girls to separate schools; and

14. These rules and procedure shall be contingent upon the enactment of statutes by the General Assembly of Georgia permitting the same to be put into operation, and shall be submitted to the General Assembly for approval. Counsel are directed to transmit copies to the [fol. 25] President of the Senate and the Speaker of the House of Representatives upon authorization by the Court.

Adopted by the Atlanta Board of Education 11/30/59.

In United States District Court

Plaintiffs' Objections to Defendants' Desegregation Plan—Filed December 12, 1959

Come now the plaintiffs by their undersigned attorneys and object to the plan filed in this court by the defendants herein on the 30th day of November 1959 in accordance with certain provisos of the order of this court made and entered in this cause on the 9th day of July 1959 and as grounds for their objection show the following:

I. The Present Plan Is Incomplete In That It Is Concerned With Only One Part Of The Order Of This Court—Pupil Assignment.

II. The Plan Avoids The Duty Imposed On Defendants To Desegregate.

III. The Inherent Delays Embodied In The Present Plan Makes A Prompt And Reasonable Start Impossible.

IV. The Burden On Defendants To Show That Additional Time Is Necessary, Once A Start Toward Full Compliance Has Been Made, Has Not Been Met.

V. Two Of The Factors Which The Plan Requires Consideration Of Are Constitutionally Irrelevant And May Not Be Applied In This Case.

[fol. 26]

VI. Certain Criteria Which The Plan Requires Shall Be Considered Are So Vague And Indefinite, So Dependent Upon Subjective Judgment, And So Irrelevant As To Permit Of Arbitrary Action In The Circumstances Of This Case.

VII. The Plan Cannot Be Made Contingent Upon The Enactment Of Statutes By The General Assembly Of Georgia Permitting The Same To Be Put Into Operation.

E. E. Moore, Jr., Suite 201, 175 Auburn Avenue, N.E., Atlanta Georgia;

Constance Baker Motley, Suite 1790, 10 Columbus Circle, New York 19, New York;

Thurgood Marshall, Suite 1790, 10 Columbus Circle, New York 19, New York. Attorneys for Plaintiffs.

Donald L. Hollowell, A. T. Walden, Of Counsel.

[fol. 27]

IN THE UNITED STATES DISTRICT COURT

ORDER OF COURT ON MOTION BY DEFENDANTS TO APPROVE PLAN—December 30, 1959

Pursuant to Order of this Court dated January 6, 1959 defendants, as members of the Atlanta Board of Education, have submitted to the Court a Plan under which they propose to operate the Atlanta Public Schools without any discrimination as to race or color. The Court issued a rule nisi, plaintiffs filed their objections to the Plan, and the matter came on for hearing on December 14, 1959.

Defendants promptly complied with the Order of Court in preparing and submitting their Plan, but cite no authorities in support of the same. Plaintiffs' counsel have cited to the Court a few decisions which bear upon the question. As the Plan must be passed upon by the Court prior to convening of the Georgia Legislature and court calendars are already set up covering the intervening period it has been necessary for the Court over the Christmas Holidays to give as much study to the matter as possible.

The Court has been greatly assisted in this matter by an article by Professor Daniel J. Meador, Assistant Professor of Law at the University of Virginia, appearing in the Virginia Law Review of May, 1959 beginning at page 517, which reviews many cases and statutes bearing upon the questions here involved and many of the cases cited be-

[fol. 28] low were obtained by the Court from that article. Should the Court find it necessary this Opinion will be supplemented or revised at a later date.

The Plan Submitted.

As introductory to the Plan itself the resolution adopting the same states certain pertinent facts confronting the Atlanta Board of Education, and these facts not being refuted by the plaintiffs are taken to be true. Among other things a recital is made that the Board is faced with the task of educating 116,000 pupils, of which approximately forty per cent, or some 46,400 are negroes; that there is at this time a rapid influx of children of school age in to the City, that these children vary in achievement and ability; that there is at present a shortage of some 580 class rooms, many classes are held in churches and other buildings, and many have double sessions. Other problems confront the Board brought about by slum clearances and changes in residential patterns in various communities.

The foregoing facts are stated by the Court to illustrate the problems confronting the defendant Board of Education. The Plan abolishes segregation beginning at the twelfth grade, and each year takes in a lower grade until all grades in all schools are included, and should all or a large part of 46,400 negro children apply for assignment at one time, it would of course put an intolerable burden upon the School Board to process their applications and make [fol. 29] readjustments in all classes and in all schools. That fact must have been in the mind of the defendants when they proposed commencing the Plan with only the twelfth grade.

Also, it is recognized that where such a Plan begins with the first grade and extends to the higher grades there is a greater problem as to adequate housing, and a greater degree of disruption in initiating the Plan.

Essentially the Plan contemplates that all pupils in the schools shall until and unless transferred to some other school, remain where they are, all new and beginning students being assigned by the Superintendent or his authority, to a school selected by observance of certain standards as set forth in the proposed Plan.

Included in the objections to the Plan offered as a whole are these:

That the Plan is not complete, that it "avoids the duty imposed on defendants to desegregate," that "the inherent delays embodied in the plan makes a prompt and reasonable start impossible; that defendants do not show that additional time is necessary, that two of the factors for transfer of placement are constitutionally irrelevant and that the criteria upon which the Plan proceeds is too vague and indefinite. It is also attacked upon the ground that it is made contingent upon passage of statutes by the Georgia General Assembly.

As many of these objections are similar they will be discussed under the several headings set forth below:

[fol. 30] (1) The objection to the Plan that it allegedly "voids the duty imposed on defendants to desegregate," is an objection heretofore frequently considered by the courts and uniformly rejected.

The real essence of this objection stems from the fact that in urban areas the public schools are frequently located in the midst of large residential areas either negro or white, and, when pupils are assigned to the school nearest to their homes and therefore reached by them more safely and easily, the result is that the school will naturally, without any racial discrimination, be composed practically without exception of only white or negro pupils.

The above result, however, where it pertains, is not necessarily brought about on account of racial discrimination, but on account of geography and residential patterns.

In the case of *Borders* v. *Rippy*, 247 F.2d 268, at p. 271, the Fifth Circuit Court of Appeals speaking through Judge Rives (now Chief Judge of that Circuit) wrote as follows:

> "The equal protection and due process clauses of the fourteenth amendment do not affirmatively command integration, but they do forbid any state action requiring segregation on account of their race or color of children in the public schools. Avery vs. Wichita Falls Independent School District, 5 Cir., 1957, 241 F.2d 230, 233. Pupils may, of course, be separated according to their degree of advancement or retardation, their ability to learn, on account of their health, or

> for any other legitimate reason, but each child is entitled to be treated as an individual without regard [fol. 31] to his race or color."

The case just cited was subsequently cited with approval by the same court, in *Holland* v. *Board of Public Instruction*, 258 F.2d 730. It is the law in this Circuit and is binding upon this Court.

The same principle of law has been followed in other cases.

In *Avery* v. *Wichita Falls Independent School District*, 241 F.2d 230, the court cited with authority the opinion of a district court which held, with reference to the case of *Brown* v. *Board of Education*, 347 U.S., 483, that the Supreme Court

> ". . . has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains . . . if the schools which it (the State) maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration; it merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action."

In a subsequent case, *Rippy* v. *Borders*, 250 F.2d 690, the Court again announced its adherence to the foregoing [fol. 32] principles.

In the Fourth Circuit in the case of *Thompson* v. *County School Board of Arlington County*, 144 F.S. 239, Judge Bryan wrote as follows:

> "It must be remembered that the decisions of the Supreme Court of the United States in Brown vs. Board of Education, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 and 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed., 1083, do not compel the mixing of the different races in the public schools. No general reshuffling of the pupils in any school system has been commanded. The order of that Court is simply that no child shall be denied admission to a school on the basis of race or color. . . . Consequently, compliance with that ruling may well not necessitate such extensive changes in the school system as some anticipate."

The above decision was affirmed by the Court of Appeals of the Fourth Circuit and certiorari to the United States Supreme Court was denied. See *The School Board of Charlottesville, Virginia, et al.* v. *Doris Marie Allen, et al.*, 240 F. 2d p. 59.

The Plan of the Atlanta School Board therefore, is not invalid merely because it prohibits racial discrimination rather than requiring a mixing of the races.

(2) Objection is made to the proposed Plan on the ground of "the inherent delays embodied in the Plan."

Plaintiffs' counsel insist that the Plan in question does not meet the requirements laid down by the Supreme Court. They cite the case of *Cooper* v. *Aaron*, 358 U.S., p. 1, where at p. 7, the Supreme Court pointed out that:

> [fol. 33] "delay in any guise in order to deny he constitutional rights of negro children could not be countenanced, and that only a prompt start, diligently and earnestly pursued, to eliminate racial segregation from the public schools could constitute good faith compliance."

There is no complaint that the processes of the Court have not moved with suitable speed. As a matter of fact, the Order requiring a Plan to be submitted was entered

within less than two years from the date of the filing of the suit. The charge of delay is based upon the contention that a period of twelve years is required for the completion of the elimination of desegregation in all of the classes in all of the schools.

Counsel for plaintiffs do not cite any cases holding that, where a prompt start is made, it can be said not to be diligently and earnestly pursued because it requires a total period of twelve years. Suffice it to say that since rendition of the Brown decision a number of school boards have established plans, some beginning at the first grade and extending through the higher grades, others beginning at the higher grades and extending through the first grades, and as far as this Court knows, none of such plans have been rejected upon the basis that they do not move with sufficient speed. A number of these plans are contained in cases which are hereinafter cited.

(3) A general review of the measures taken in many southern states and border states since the rendition of the [fol. 34] *Brown* decision, both by way of legislative enactments and by way of plans adopted without legislative action, show that the so-called Pupil Placement Plan (also referred to as Pupil Assignment Plans, Enrollment Plans, etc.) have been adopted in one form or another in many states, including Virginia,[1] North Carolina, Alabama, Louisiana, South Carolina, Florida, and Tennessee. In some of these states the plans were adopted soon after the Brown decision, although there was at the time of the adoption of the same, no litigation pending nor any action being taken toward the elimination of racial discrimination. The plans were no doubt adopted against the day when such efforts would be made and they were adopted in full recognition of the fact that the people of the states adopting them had no desire to abolish segregation, but con-

[1] The legislative history of Virginia's first Pupil Placement Law which was held invalid is contained in Adkins v. School Board, 148 F.S., 430, decided January 11, 1957. Subsequent legislation in Virginia upon this question and various local plans therein established based upon the inherent power of the school authorities, are not discussed in this Opinion.

sidered it wise to make plans for the future against the day when segregation in such states might be enjoined by the courts. Mississippi was one of the first states to adopt such legislation, though as yet there have been no efforts to abolish segregation in that state.

It appears also the Pupil Placement Plans have been [fol. 35] of force in various parts of the country for many years before the matter of racial discrimination became an issue.

It is now well established that school authorities have the inherent power to exercise their own discretion as to the assignment of pupils to various schools within their respective systems so long as their discretion is exercised in good faith and discrimination does not exist.

It therefore appears clearly that the Plan submitted by defendants is within the power of the defendant School Board to establish the same unless subject to one or more of the defects charged against it.

(4) Plaintiffs insist that "two of the factors which the Plan refuse consideration of are constitutionally irrelevant and may not be applied in this case," these factors being the following:

(1) The possibility of threat of friction or disorder among pupils or others, and

(2) The possibility of breaches of the peace or ill will, or economic retaliation within the community.

In the case of *Cooper* v. *Aaron*, 358 U.S., p. 1, the School Board in Little Rock sought a postponement of their program for desegregation "because of extreme public hostility." The trial judge found as a fact that there were "repeated incidents of more or less serious violence directed against negro students and their property" (see p. 13). The Supreme Court held that the foregoing facts did not justify [fol. 36] a postponement of the plan of desegregation, stating that however desirable the preservation of the public peace may be "it cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." (See p. 16).

It therefore follows that the two considerations quoted above cannot validly be considered by the Board of Education where such factors pertain only to race or color. Whether these factors might be material under facts not involving race or color need not now be determined. That is to say, whether or not the personal traits of a pupil, regardless of race or color, might create a possibility of threat of friction or breach of peace is another question.

(5) Plaintiffs' counsel contend that the following standards are too vague and indefinite, to-wit:

> "(1) the psychological qualification of the pupil for the type of teaching and associations involved (Paragraph 1).
>
> (2) the psychological effect upon the pupil of attendance at a particular school (Id.).
>
> (3) the home environment of the pupil (Id.).
>
> (4) the maintenance or severance of established social and psychological relationships with other pupils and with teachers (Id.).
>
> (5) the ability to accept or conform to new and different educational environment (Id.).
>
> (6) the morals, conduct, health and personal standards of the pupil (Id.)."

[fol. 37] It is true that "psychological qualifications" and "psychological effect" are broad and general terms. Psychology covers a vast field. "Psychological test" has been defined as "any method used for measuring an individual's mental characteristics, as memory, intelligence, emotionality, intelligence or speed of reaction." See Webster's New International Dictionary, 2nd Ed. Certainly the foregoing factors would be relevant and material in Pupil Placement and there is no reason why they should be applied in a discriminatory way. The fact that the language is general does not mean that it can be made to encompass a test which would not be valid.

Should the defendant Superintendent of Schools interpret such factors in a way that would be discriminatory

the pupil involved would have the right of review. A finding against a pupil based upon psychological tests should be sufficiently definite so that the ruling upon review could be understood.

Indeed the Supreme Court in deciding the case of *Brown, et al* v. *Board of Education of Topeka*, 347 U.S., 483, based its decision in part upon the psychological effect which certain practices may have upon the students involved.

(6) Plaintiffs also contend in their brief that the Plan in question is not proposed in good faith and will be violated. This same contention was urged in the case of *Shuttlesworth* v. *Birmingham Board of Education*, 162 F.S., 372, but was rejected by a three-judge court whose judg- [fol. 38] ment was affirmed. 358 U.S., 101. The trial court after stating that they could not in testing the constitutionality undertake a search for motive stated the following:

> "If, however, we could assume that the Act was passed by the Legislature with an evil and unconstitutional intent, even that would not suffice. As executive officers of the State, the members of the defendant Board are likewise required to 'be bound by Oath or Affirmation to support this Constitution.' No court without evidence can possibly presume that members of the defendant Board of Education will violate their oaths of office."

The objection is not well taken.

(7) Plaintiffs object to the administrative procedure set forth in the Plan whereby a pupil might have a review of the rejection of his application for placement or transfer. In plaintiff's brief it is stated:

> "The Plan fails to set a period of time within which the Superintendent of the Board must act upon an application for assignment or transfer."

This objection is well taken. Following is an outline of the Plan in so far as it regards administrative appeal:

Under the schedule contained in the Plan for the administrative consideration of these applications, it would be

difficult if not impossible, for an application filed on June 15th to be completely processed by September 1st for this reason: Upon filing of application for transfer on or before June 15th, the Board is required to "act upon the same within a reasonable time" (Paragraph 8 of the Plan). If a hearing is requested by the applicant or held by the [fol. 39] Board, five days notice shall be given to the parents or guardian and "the hearing will be begun within thirty days from the receipt by the Board of the request" (Paragraph 8 of the Plan). A hearing may be conducted by the Board itself, in which event it could probably make a prompt decision. However, it is provided said hearing may be had before not less than three of its members, or before competent examiners, which shall report to the Board and "no final order shall be entered in said case until each member of the Board of Education has considered the entire record." The Board will notify applicant of its position "within twenty days after the conclusion of the hearing." Exceptions to the decision made by the Board may be filed within five days of notice of the Board's decision, and the Board shall meet within fifteen days of the receipt of the exceptions to consider the same.

The foregoing would consume a period of time in excess of seventy-five days, and only seventy-five days elapse between June 15th and September 1st. Furthermore, endless delay could be caused by the provision that no final order would be entered before each member of the Board of Education should consider the entire record, nor does it appear certain that some member will not be hindered in some way from considering the entire record.

The Plan further provides that "any person dissatisfied with the final decision of the Board may appeal to the State Board of Education as provided by law." To that end [fol. 40] there was introduced in evidence (Plaintiffs' Exhibit #1) a booklet entitled "Georgia School Laws", Part XXXVI pertaining to procedure in cases on appeal to the State Board of Education. However, that portion of the school laws pertains to appeal in "all controversies heard by a county board of education" and this case involves a city board of education.

As the defendant school board has merely submitted its plan because the Court ordered it to do so, and is making no effort to sell the Plan to the Court, various aspects of the matter are left open. The Plan, however, will have to be changed in so far as the procedure in regard to applications for transfer are concerned, so as to insure a hearing upon such applications promptly following June 15th of each year, and a final administrative decision on the same on or before September 1st of each year. Explanation should also be made in connection therewith as to what is meant by "appeal to the State Board of Education," particularly since the latter party is not a party to this case and cannot be compelled by this Court to make a ruling upon such appeal.

Counsel for defendants stated at the hearing that defendants would be willing to amend this Plan, and defendants are therefore directed to file an amendment to the same with this Court in the regards above specified on or before January 6, 1960, serving opposing counsel with a copy of the amendment immediately upon its completion, and plaintiffs may file written objections thereto within [fol. 41] five days thereafter, and the Court will then make a ruling upon any objections then pending.

There are several decisions which go into the matter of validity of standards which school authorities may adopt as to Pupil Placement and Assignment, same being discussed in *Shuttlesworth* v. *Birmingham Board of Education*, 162 F.S., p. 372. There a three-judge court upheld the Alabama statute and its decision was affirmed by the United States Supreme Court (358 U.S., 101).

The trial court pointed out that Pupil Placement Laws had been enacted in ten states (see p. 379, h.n.6). Attention was called to the fact that statutes in Louisiana and Virginia had been held void, pointing out also that the Alabama law was more similar to a statute of North Carolina which had been held valid in *Carson* v. *Warlick*, 238 F.2d 724, cert. denied 353 U.S., 910. This Court assumes that all of the standards set forth in the proposed Plan not herein attacked are conceded to be valid.

Able counsel for plaintiffs places great emphasis on the case of *Gibson* v. *Board of Public Instruction of Dade*

County, Florida, et al., —— F.2d, p. —— (Nov. 24, 1959) by the Fifth Circuit Court of Appeals. This Court interprets that case as holding that the Pupil Assignment Law involved therein did not meet the requirements of law primarily for the reason that after its adoption,

> "no notice or advice from the Board or Superintendent [fol. 42] was given to the children and their parents . . . to the effect that negro children . . . were not permitted to have considered fairly their choice of a school"

and upon the further ground that after adoption of the Plan the school authorities continued to designate the schools separately according to races. That case does not seem to be controlling upon the case at Bar.

(8) It is contended "the Plan can not be made contingent upon the enactment of statutes by the General Assembly of Georgia permitting the same to be put into operation." As to the above objection at the time of the hearing on December 14th the Court sought to make full explanation concerning the provisions in the Order of this Court entered July 9, 1959 that defendants might submit a plan contingent upon its approval by the Georgia Legislature.

At the risk of repetition the Court now states that the existence of certain Georgia statutes would mean that the mixing of races in any school of the Atlanta School System would mean that all financial aid to the same from the State would be cut off, and apparently without the aid of funds from the State the Atlanta School System could not operate, as a great portion of the finances for Georgia schools is derived from the State.

For the Court to order the Atlanta Public Schools to desegregate would be equivalent therefore to ordering them to close. Since the Legislature meets in January, [fol. 43] 1960 and the next school terms begins in September, 1960, there is therefore no delay caused by making the Plan contingent upon the passage of legislation which will permit the Atlanta schools to carry through their plan without punitive action on the part of the State.

As then stated by the Court, it was and is, the feeling of the Court that the people of Georgia through their chosen

representatives in the Legislature should be allowed to make the important decision as to whether they would prefer the closing of their schools on one hand, to the gradual desegregation of the schools on the other hand, pursuant to the Plan under consideration.

(9) To guard against the contingency that certain portions of the proposed Plan might hereafter be held invalid by the courts for any reason, the Plan should contain a severability provision so that the elimination of any invalid test or standard would not cause the entire Plan to fall. Compare *Shuttlesworth* v. *Birmingham Board of Education*, 162 F.S., p. 372(7).

(10) By way of Summary the rulings now made by the Court are as follows:

(a) The Plan submitted by the Board of Education must be amended on or before January 6, 1960 to provide for more expeditious administrative procedure (see Paragraph 7 above).

(b) The Plan must be amended so as to contain a [fol. 44] severability provision (see Paragraph 9 above).

(c) Standards referred to in Paragraphs 4 and 5 above, relating to contemplated friction or breaches of the peace, shall be taken to contemplate factors other than racial discrimination. Factors concerning "economic retaliation" must be stricken from the Plan (see Paragraph 4 above).

(d) Standards involving psychological factors must be applied with reference to race or color, placements based upon the same must specifically designate the facts upon which the findings are made.

(11) Counsel for all parties have the right to move for amendment to this Order based upon any misstatement of facts that might be contained therein. Further Order of the Court will be made on or after January 6th next when amendment to the Plan is offered by defendants.

This the 30 day of December, 1959.

Frank A. Hooper, United States District Judge.

[fol. 45]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFFS' OBJECTIONS TO PLAN AS AMENDED—
Filed January 8, 1960

Come now the plaintiffs by their undersigned attorneys and object to the amended desegregation plan of defendants upon the same grounds upon which plaintiffs objected to defendants' original desegregation plan, except insofar as the order of this Court dated December 30, 1959 upheld plaintiffs' objections, and object to the plan as amended on additional grounds, as follows:

I. The plan, as amended, does not provide for a speedy final administrative review of the action of the superintendent in assigning children to school.

II. The plan, as amended, does not explain what the defendants mean by appeal to the State Board, an explanation of which was required by order of this Court of December 30, 1959.

III. The plan should incorporate the directions contained in the order of this Court of December 30, 1959, Paragraph (10)(c) and (d).

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Donald L. Hollowell, A. T. Walden, Of Counsel.

[fol. 46]

IN THE UNITED STATES DISTRICT COURT

DEFENDANTS' PLAN AS FINALLY AMENDED

Resolution of Atlanta Board of Education Adopted November 30, 1959 and Amended January 4, 1960 and Amended January 18, 1960

Whereas, The Atlanta Board of Education has been directed to present to the Court by December 1, 1959, a plan designated to bring about compliance with the order of the Court of July 9, 1959; and

Whereas, The Atlanta Board of Education is making every effort to provide the Atlanta Public School System with the very best buildings, equipment, and other facilities and curricula for approximately 116,000 students; and

Whereas, The City of Atlanta is undergoing rapid urbanization, bringing an influx of children of varying degrees of achievement and ability due not only to individual aptitude but to educational opportunities heretofore available; and

Whereas, There is and has been much public construction in Atlanta, which together with other building has resulted in drastic changes in neighborhood patterns, and these changes will be greatly magnified by the proposed slum clearance program involving the vacating of more than 1,200 acres of land with the resultant displacement of families, and

Whereas, These factors result in not only a continuous influx of new students into the system, but in the continu-[fol. 47] ous movement of students within the system, and also from the system into the suburban areas adjoining Atlanta; and

Whereas, The changing neighborhood patterns, the 39 million dollars worth of new school construction since 1948, the great influx of new students, and the continuous movement of students within the system has caused admission, assignment, transfer, and continuance of students in and

to the various schools within the system to become a major problem of the administration; and

Whereas, Pending further studies and recommendations by the school authorities, the Board of Education considers that any general or arbitrary reallocation of pupils heretofore entered in the public school system according to any rigid rule of proximity of residence or in accordance solely with requests on behalf of pupils would be disruptive to orderly administration, and would tend to invite or induce disorganization and would impose an excessive burden on the available resources as well as the teaching and administrative personnel of the schools; and

Whereas, in September, 1960, there will be a shortage of 580 classrooms in Atlanta schools and many children are now on double sessions, housed in churches and facilities other than classrooms, and the Board realizes that continuous system-wide studies must be made to determine available seats for students and studies of achievement and ability of the students where these seats may exist as well [fol. 48] as other factors consistent with the educational policies governing the admission, assignment, transfer, and placement of pupils in the public schools as will be prescribed in this document; and

Whereas, The State Board of Education has not promulgated rules and regulations relative to the placement of students in the schools, and this Board has the inherent power of pupil placement, and more complete regulations are necessary

Now Therefore: To insure orderly procedure of uniform application for pupil assignment, transfer and/or placement, and to enable the continuing improvement of the educational advantages offered the following rules and procedure shall be followed:

1. In the assignment, transfer or continuance of pupils among and within the schools, or within the classroom and other facilities thereof, the following factors and the effects or results thereof shall be considered, with respect to the individual pupil, as well as other relevant matters:

Available room and teaching capacity in the various schools; the availability of transportation facilities; the effect of the admission of new pupils upon established or proposed academic programs; the suitability of established curricula for particular pupils; the adequacy of the pupil's academic preparation for admission to a particular school and curriculum; the scholastic aptitude and [fol. 49] relative intelligence or mental energy or ability of the pupil; the psychological qualification of the pupil for the type of teaching and associations involved; the possibility of threat or friction or disorder among pupils or others; the possibility of breaches of the peace or ill will; the effect of admission of the pupil upon the academic progress of other students in a particular school or facility thereof; the effect of admission upon prevailing academic standards at a particular school; the psychological effect upon the pupil of attendance at a particular school; the home environment of the pupil; the maintenance or severance of established social and psychological relationships with other pupils and with teachers; the choice and interests of the pupil; the ability to accept or conform to new and different educational environment; the morals, conduct, health and personal standards of the pupil; the request or consent of parents or guardians and the reasons assigned therefor.

2. Subject to supervision and review by the Board, the City Superintendent of Schools shall have authority and be charged with responsibility with respect to the assignment (including original and all other admissions to the school system), transfer and continuance of pupils among and within all public schools operated under the jurisdiction of the Atlanta Board of Education.

[fol. 50] 3. The Superintendent shall have authority to determine the particular public school to be attended by each child applying for assignment or transfer, and no child shall be entitled to be enrolled or entered in a public school until he has been assigned thereto by the Superintendent or his duly authorized representative. All existing school assignments shall continue without change

until or unless transfers are directed or approved by the Superintendent or his duly authorized representative.

4. Between May 1st and May 15th applications for the admission, assignment or transfer, and/or placement of pupils to or in particular schools shall be directed to the Superintendent of Schools and shall be delivered to the school principal unless otherwise directed by the Superintendent on forms provided by the Superintendent, and made available at the offices of the Board of Education. Such forms shall be delivered only on request of and to the applicant student or to his parent or legal guardian in person, by the principal of the school then attended by such student or by the Superintendent of Schools.

5. A separate application must be filed by each pupil desiring assignment or transfer to a particular school and no joint application will be considered.

6. Applications for assignment or transfer of pupils must be filled in completely and legibly in ink or typewriter [fol. 51] and must be signed by both parents or the parent to whom the child has been awarded by court proceedings, or the legal guardian of each child for whom application is made. Further, the application must be notarized at the time it is filed. The Superintendent may in his discretion require interviews with the child, the parents or guardian, or other persons and may conduct or cause to be conducted such examinations, tests and other investigations as he deems appropriate. In the absence of excuse, satisfactory to the Superintendent or the Board, failure to appear for any requested examination, test or interview by the child or the parents or guardian will be deemed a withdrawal of the application.

7. Notice of the action taken by the Superintendent on each application shall be mailed to the parents or guardian at the address shown on the application, within thirty days from the delivery of the application to the school principal, in no event later than June 15th. Such action shall be final unless a hearing before the Board is requested in writing within ten days from the date of mailing such statement.

8. A parent or guardian of a pupil may file in writing with the Atlanta Board of Education objections to the assignment of the pupil to a particular school, or may request by petition in writing assignment or transfer to a designated school or to another school to be designated [fol. 52] by the Board. Unless a hearing is requested, or unless the Board deems a hearing necessary, the Board shall act upon the same within a reasonable time stating its conclusion. If a hearing is requested or if the Board deems a hearing necessary with respect to the Superintendent's conclusion on an application, the parents or guardian will be given at least ten days' written notice of the time and place of the hearing. The hearing will be begun within twenty days from the receipt by the Board of the request or the decision by the Board that a hearing is necessary. Failure of the parents or guardian to appear at the hearing will be deemed a withdrawal of the application.

9. The Board may conduct such hearing or may designate not less than three of its members to conduct the same and may provide that the decision of the members designated or a majority thereof shall be deemed a final decision by the Board. The Board of Education may designate one or more of its members or one or more competent examiners to conduct any such hearing, take testimony, and report the evidence, with its recommendation, to the entire Board for its determination within ten days after the conclusion of such hearing. In addition to hearing such evidence relevant to the individual pupil as may be presented on behalf of the petitioner, the Board shall be authorized to conduct investigations as to any objection [fol. 53] or request, including examination of the pupil or pupils involved, and may employ such agents and others, professional and otherwise, as it may deem necessary for the purpose of any investigations and examinations.

10. Unless postponement is requested by the parents or guardian, the Board will notify them of its decision within ten days after its receipt of the report of the examiner, or the conclusion of any hearing before the Board. Exceptions to the decision of the Board may be filed,

within five days of notice of the Board's decision, and the Board shall meet promptly to consider the same: Provided, however, That every appeal shall be finally concluded by the Board before September 1st. Provided further that nothing herein contained shall be construed to deprive any person dissatisfied with the final decision of the Board of the right to appeal to the State Board of Education as provided by law.

11. If, from an examination of the record made upon objections filed to the assignment of any pupil to a particular school, or upon an application on behalf of any pupil for assignment to a designated school, or another school to be designated by the Board, or from an examination of such pupil by the Board or its authorized representative, or otherwise, the Board shall determine that any such pupil is between his or her seventh and sixteenth birthdays and is mentally or physically incapacitated to [fol. 54] perform school duties, or that any such pupil is more than sixteen years of age and is maladjusted or mentally or otherwise retarded so as to be incapable of being benefited by further education to the extent that further use of public funds for the education of such pupil is not justified, the Board may assign the pupil to some available vocational or other special school, or terminate the public school enrollment of such pupil altogether.

12. Beginning September 1, 1960, or on September 1, following favorable action by the General Assembly of Georgia, student assignment in the Atlanta Public School System shall be made in accordance with aforesaid rules and regulations and without regard to race or color. For the first school year in which it is effective, the plan shall apply to the students in the 12th grade. Thereafter, in each successive year, the plan shall be expanded to the immediate lower grade; e.g., in 1961-62—Grade 11, in 1962-63—Grade 10, etc., until all grades are included.

13. Nothing contained in this resolution shall be construed to prevent the separation of boys and girls in any school or grade, or to prevent the assignment of boys and girls to separate schools.

14. If any paragraph of these rules and procedure shall be held by any court of competent jurisdiction to be in-
[fol. 55] valid for any reason, the remaining paragraphs shall continue of full force and effect. If any portion, clause or sentence of any paragraph shall be held by any court of competent jurisdiction to be invalid for any reason, the remainder of any such paragraph shall continue of full force and effect.

15. These rules and procedure shall be contingent upon the enactment of statutes by the General Assembly of Georgia permitting the same to be put into operation, and shall be submitted to the General Assembly for approval. Counsel are directed to transmit copies to the President of the Senate and the Speaker of the House of Representatives upon authorization by the Court.

IN UNITED STATES DISTRICT COURT

ORDER OF COURT APPROVING PLAN—January 20, 1960

The defendants on January 19, 1960 having filed amendment to the Plan of Operation for Atlanta Public Schools, which meets the requirements of previous Orders of the Court, said Plan as finally amended is herewith approved by the Court.

This the 20th day of January, 1960.

Frank A. Hooper, United States District Judge.

[fol. 56]

IN UNITED STATES DISTRICT COURT

MOTION FOR FURTHER RELIEF—Filed February 26, 1960

Come now the plaintiffs by their undersigned attorneys and move this Court for an order directing defendants to commence their court approved pupil assignment plan on May 1, 1960 and as grounds therefor show the following:

1. By its order of July 9, 1959 this Court retained jurisdiction of this cause "for the purpose of entering such further orders or granting such further relief as may be necessary to bring about compliance with this decree and during such time as may be necessary to put into effect the defendants' plan."

2. On January 20, 1960 this Court approved the defendants' plan as finally amended and which provides, in part, as follows:

> 4. Between May 1st and May 15th applications for the admission, assignment or transfer, and/or placement of pupils to or in particular schools shall be directed to the Superintendent of Schools and shall be delivered to the school principal unless otherwise directed by the Superintendent on forms provided by the Superintendent, and made available at the offices of the Board of Education. Such forms shall be delivered only on request of and to the applicant student or to his parent or legal guardian, in person, by the principal of the school then attended by such student or by the Superintendent of Schools.

3. Defendants' plan as finally amended was submitted to this Court pursuant to the order entered by this Court [fol. 57] on July 9, 1959 which provided, in part, as follows:

> Provided Further That, defendants are herewith directed to present to this Court, on or before the first day of December, 1959 a complete plan, adopted by them, which is designed to bring about compliance with this order, and which shall provide for a prompt and reasonable start toward desegregation of the public schools of the City of Atlanta and a systematic and effective method for achieving such desegregation with all deliberate speed. Such plan may be submitted contingent upon the enactment of statutes permitting such plan to be put into operation.

4. Pursuant to said order, on November 30, 1959 defendants filed with this Court their plan which provided, in part, as follows:

> These rules and procedure shall be contingent upon the enactment of statutes by the General Assembly of Georgia permitting the same to be put into operation, and shall be submitted to the General Assembly for approval. Counsel are directed to transmit copies to the President of the Senate and the Speaker of the House of Representatives upon authorization by the Court.

5. Thereafter, on December 2, 1959 this Court entered an order directing the plaintiffs to show cause on December 14, 1959 why the plan should not be approved by the Court.

6. Subsequently, on December 12, 1959 plaintiffs filed with the Court their objections to the plan which, inter alia, made objection to the plan on the following ground:

> VII. The Plan Cannot Be Made Contingent Upon The Enactment Of Statutes By The General Assembly Of Georgia Permitting The Same To Be Put Into Operation.

[fol. 58] 7. On December 30, 1959 the Court entered an order directing defendants to amend their plan, but the order did not direct defendants to amend their plan to eliminate the provision, set forth above, which makes the plan contingent upon the enactment of statutes by the General Assembly of Georgia permitting the same to be put into effect and operation. However, the Court in its opinion of the same date stated the following:

> (8) It is contended "the Plan can not be made contingent upon the enactment of statutes by the General Assembly of Georgia permitting the same to be put into operation." As to the above objection at the time of the hearing on December 14th the Court sought to make full explanation concerning the provisions in the Order of this Court entered July 9, 1959 that defendants might submit a plan contingent upon its approval by the Georgia Legislature.
>
> At the risk of repetition the Court now states that the existence of certain Georgia statutes would mean

that the mixing of races in any school of the Atlanta School System would mean that all financial aid to the same from the State would be cut off, and apparently without the aid of funds from the State the Atlanta School System could not operate, as a great portion of the finances for Georgia schools is derived from the State.

For the Court to order the Atlanta Public Schools to desegregate would be equivalent therefore to ordering them to close. Since the Legislature meets in January, 1960 and the next school term begins in September, 1960, there is therefore no delay caused by making the plan contingent upon the passage of legislation which will permit the Atlanta schools to carry through their plan without punitive action on the part of the State.

As then stated by the Court, it was and is, the feeling of the Court that the people of Georgia through [fol. 59] their chosen representatives in the Legislature should be allowed to make the important decision as to whether they would prefer the closing of their schools on one hand, to the gradual desegregation of the schools on the other hand, pursuant to the Plan under consideration.

8. Thereafter, on January 6, 1960, pursuant to the December 30, 1959 order of the Court, the defendants submitted an amended plan.

9. On January 8, 1960 plaintiffs filed objections to the plan as amended upon the same grounds on which plaintiffs objected to the original plan, except insofar as the order of this Court of December 30, 1959 upheld plaintiffs' objections, and on additional grounds.

10. On January 18, 1960 this Court entered an order which required defendants to make further amendments to the plan, as amended, but once again this Court did not require the defendants to delete from their plan that provision which made the plan subject to enactment of statutes by the General Assembly of Georgia permitting the plan to

go into operation. Said order also overruled all of plaintiffs' additional objections to the plan as amended.

11. Thereafter, on January 19, defendants made the amendments to the plan required by the Court and on January 20 the Court approved defendants' plan as finally amended.

12. The General Assembly of Georgia convened in regular session on January 11, 1960 and adjourned February 1960 without enacting any statutes which would permit the [fol. 60] defendants' plan to go into operation and without repealing any of the Georgia laws which provide for the withholding of state funds or the closing of schools in which the races are mixed. Plaintiffs allege on information and belief that the only action taken by the General Assembly of Georgia was the establishment of a study commission to study the matter and to report to the Legislature by May 1, 1960.

13. Plaintiffs say that defendants' plan, as finally approved by this Court, cannot be made contingent upon the enactment of laws by the General Assembly of Georgia for the following reasons:

(1) No law of the State of Georgia, by its terms, prohibits the defendants from putting their plan, as approved by this Court, into effect.

(2) If the laws authorizing the withholding of state funds from defendants and the closing of any school in which the races are mixed by defendants are invoked against defendants, defendants have ample tested remedies available to them.

(3) The Constitution of the United States as construed by the Supreme Court of the United States is the supreme law of the land and the rights guaranteed thereby cannot be made contingent upon approval by the General Assembly of Georgia.

Wherefore, plaintiffs pray that this Court will enter an order directing defendants to proceed with their plan as [fol. 61] finally approved by this Court beginning May 1,

1960. Plaintiffs further pray that this Court enter an order granting the plaintiffs their costs herein and grant them such further, other, additional or alternative relief as may appear to this Court to be equitable and just.

Respectfully submitted,

E. E. Moore, Jr., Suite 201, 175 Auburn Avenue, N.E., Atlanta, Georgia;

Constance Baker Motley, Thurgood Marshall, Suite 1790, 10 Columbus Circle, New York 19, N. Y., Attorneys for Plaintiffs.

Donald L. Hollowell, A. T. Walden, Of Counsel.

Notice of Motion (omitted in printing).

[fol. 63]

In United States District Court

Order of Court—March 9, 1960

On February 26, 1960 Plaintiffs filed with this Court a motion reciting in substance the following:

That this Court on January 20, 1960 approved a Plan as amended, submitted by the Atlanta Board of Education, providing for elimination of discrimination in the operation of its schools and providing that applications for assignment and transfer should be filed with the Atlanta school authorities between May 1st and May 15th of each year, but that approval of such Plan was made contingent upon action of the Georgia Legislature permitting the same to be put in effect.

The motion points out that the Legislature met in January, but adjourned without enacting any laws permitting such Plan to be put in effect, but that the Legislature did pass a resolution appointing a Commission to study the entire question and to file a report on or before May 1, 1960.

Plaintiffs' present motion prays "that this Court will enter an Order directing Defendants to proceed with their

Plan as finally approved by this Court beginning May 1, 1960." A response filed by Defendants pursuant to Order of the Court points out that the General Assembly of Georgia did adopt a resolution creating a "General Assembly Committee on Schools", a copy of the resolution being attached to the motion and also a list of the nine-[fol. 64] teen members of the Committee, giving as to each the official positions occupied by each member, and other information concerning each.

The Court agrees with the statement made in the response to said motion "that the members of the Committee, some or all of whom may be known to the Court, are all reputable, high-class citizens of the State of Georgia" and that Respondents have every reason to believe that they are approaching the problems presented by the Order of this Court and the Plan adopted by Respondents in good faith," and that "the Committee is now engaged in conducting hearings" and that "hearings will be conducted in every Congressional District of the State."

The Court also accepts as true the statement made in the response "that until the General Assembly Committee on Schools provided for by resolution of the General Assembly completes its hearings and makes its report and recommendations, it cannot be determined what action by the General Assembly will be recommended by the Committee, and until the General Assembly considers such recommendation, it cannot be determined what final action will be taken thereon by the General Assembly, or what final action will be taken by the General Assembly upon the Plan submitted to the Court, and with the approval of the Court submitted to the General Assembly."

This Court during the progress of this case has repeatedly made the statement that the Court would not commit [fol. 65] itself as to what action the Court would take beyond the date of adjournment of the session of the Legislature which convened in January, 1960. The adjournment of the Legislature without taking affirmative action toward permitting the Atlanta Board of Education to put its Plan in effect does not come as any great surprise to all of our citizens who are familiar with campaign promises heretofore made by members of the General

Assembly and familiar with the general misconceptions in the minds of perhaps a majority of the people of this State concerning the real questions at issue, and concerning the gravity of the decision which the Legislature is called upon to make.

However, failure of the Legislature to take such definite action at its recent session does not close the door necessarily to institution of Respondents' Plan, whether effective September, 1960 or September, 1961. The legislative Committee will make its report on May 1, 1960. Under the Respondents' Plan, applications for assignment or transfer may be made between those dates.

However, the Court is reserving its decision upon the question as to whether such Atlanta Plan shall commence in the school year 1960 or at a later date, pending the report to be filed by said legislative Committee on May 1st.

The Court therefore, is denying said motion by Plaintiffs for an Order at this time directing said Plan to begin in Septemb[illegible], 1960, and is setting said motion for a hearing [fol. 66] at ten o'clock A.M. on Monday, May 9, 1960, at which time the Court will consider the report of said legislative Committee and any other matters that may then be brought to the attention of the Court, and will then determine the question as to the date on which said Atlanta Plan must become operative.

If the Plan is ordered operative as of September, 1960 as prayed by Plaintiffs in this motion, it will not be too late, as applications for assignment and transfer not only could have been filed prior to that date, but could be filed for several days subsequent to that date and prior to May 15th. Reception of such applications by the Atlanta Board of Education would not be a violation of any Georgia law, nor a commitment upon their part that the Plan would begin in September, 1960.

This Court on many occasions during the progress of this case has remarked that the decisions of the United States Supreme Court must be carried out by the Courts, also that deliberation in carrying out the same is just as important as speed, and that no good purpose can be

served by a District Judge in delaying the enforcement of the Supreme Court decisions, unless during such periods of delay good faith efforts are being made by defendants in the case to work out a solution to the many difficult problems therein involved, too well known to require elaboration.

This Court at the present time is not utterly without [fol. 67] hope that the people of Georgia, when properly and adequately informed of the true issues in the matter, will adopt a course of action which will preserve the common schools of Georgia and avoid a closing of the same, which might bring on a disruption and damage requiring many years to repair.

This Court also takes judicial cognizance of the fact that while the legislative Committee has only held a few public meetings, that such meetings are giving to the people of this State an opportunity of full and free discussion, participated in by people of all races, colors, and schools of thought. The meetings are also conducive to a better understanding upon the part of all of the citizens of Georgia of the real issues involved, and will better enable the citizens of this State to determine whether in the last analysis they would prefer to let the various local school authorities and the local citizens vitally interested therein decide for themselves the future conduct of such schools, or whether on the other hand, the citizens of our State through their chosen representatives in the Legislature would prefer to take the position that the elimination of discrimination will not be permitted in any school whatsoever, even though such disposition might eventuate in the closing of all schools.

In denying the prayers of the Plaintiffs' motion at the present time this Court is giving to movants a certificate as provided by Act of Congress to enable movants to take [fol. 68] an appeal to the Circuit Court of Appeals upon any phases of this case as desired, including the previous Order of this Court which approved the Atlanta School Plan, and including the present denial by the Court of Plaintiffs' motion to put the same into effect as of September, 1960 by an Order passed at this time, rather than

deferring such decision until the hearing set by this Court May 9, 1960, as aforesaid.

This the 9th day of March, 1960.

Frank A. Hooper, United States District Judge.

IN UNITED STATES DISTRICT COURT

ORDER OF COURT—May 9, 1960

The above stated case has come on for a hearing on this date upon the Order of the Court entered March 9, 1960 upon plaintiff's Motion for Further Relief filed February 26, 1960. Said Motion for Further Relief sought an Order of the Court making effective the Plan of Operation of the Atlanta Public School System as of the school term beginning in September, 1960. The Court withheld action upon said Motion for Further Relief pending the filing of a report by the General Assembly Committee on Schools.

[fol. 69] It Is Now Ordered that the Motion for Further Relief, in so far as it seeks to put said Plan into operation as of September, 1960, be and the same is hereby denied.

It Is Further Ordered however, that the Motion for Further Relief be granted to the effect that said Plan shall be effective as of May 1, 1961 looking toward the operation of the school system for the session beginning in September, 1961.

Said Plan, however, which contemplates the assignment, transfer or continuance of pupils must contemplate the same as to both the twelfth and the eleventh grades beginning September, 1961.

The effect of this Order is that defendants shall as of May 1, 1961 put into operation the Plan heretofore approved by this Court, receiving applications from May 1st to May 15th to the twelfth and the eleventh grades of the Atlanta Public Schools, and shall do so whether or not the General Assembly of Georgia at its session in January,

1961 passes legislation permitting defendants to put said Plan into operation.

An Opinion will be filed pursuant to this Order at a later date.

This the 9th day of May, 1960.

Frank A. Hooper, United States District Judges

[fol. 70]

IN UNITED STATES DISTRICT COURT

OPINION ON PLAINTIFFS' MOTION FOR FURTHER RELIEF —September 8, 1960 and Filed September 13, 1960

On February 26, 1960 plaintiffs filed a motion, seeking to require defendants to put into operation the Plan heretofore approved by this Court under which the public schools of the City of Atlanta might operate without discrimination. Plaintiffs pray that the Plan become effective in September, 1960. This Court on May 9, 1960 denied such prayers, but decreed that the Plan should be effective in September, 1961.

At the time of hearing the aforesaid motion the Court made a full explanation of the reasons for the year's delay, stating that such remarks would be edited and filed of record subsequently. This Opinion performs that function.

(1) History of This Litigation.

When this action was filed the people of Georgia did not seem to consider that it created any immediate threat to Georgia's common schools. The Judges of this Court in the Fall of 1958 passed an Order advising the case would be tried before September, 1959. Not until that time did the people begin to realize that something must be done. Meetings were held and various organizations formed to meet the problem.

In June, 1959 this Court declared that segregation existed, that it must be terminated, and that the defendant Board of Education should file a Plan toward that end by

[fol. 71] December, 1959, which was done. After various objections were considered the Plan was approved in its final form on January 18, 1960.

The Court at that time declined to order the Plan effective in September, 1960, reserving such ruling until a Commission, appointed by the Georgia Legislature, in January, 1960, should have an opportunity to make its report, the report being due May 1, 1960. The report was filed on that date and pursuant to previous Order of this Court a hearing was held May 9, 1960. At that time the Plan was ordered to commence in September, 1961, for reasons hereinafter set forth.

(2) Throughout this litigation the Court has held to the opinion that delay in ordering the entire elimination of segregation in the Atlanta Public Schools could be justified only in the event that bona fide efforts were being made to eliminate the same under a reasonable and gradual Plan. If no good faith efforts were to be made to that end nothing could be accomplished by delay.

The Georgia Legislature in January, 1960 did not enact legislation which would allow the Atlanta Public Schools to commence operation under the aforesaid Plan, but left the matter in such status that, under the Georgia laws as they existed, the operation of such Plan in September, 1960 would have meant the closing of the Atlanta Public Schools, with the possible further consequence that all of Georgia's [fol. 72] common schools must be closed.

The Legislature at that session, however, did appoint a committee of outstanding Georgians to study the matter and report back May 1, 1960. Some might have thought that the failure of the Legislature in January, 1960 to pass laws permitting operation of the Atlanta Plan should have induced the Court to order the Plan into effect anyway in September, 1960. The Court, however, did not agree. In the first place, such Order of Court could have no effect except to close the Atlanta schools and risk the danger of all of Georgia's schools being closed. In the second place, the Georgia Legislature in January, 1960 had for the most part been elected upon their promises to the people that they would not under any circumstances permit any in-

tegration in any school in Georgia, and they felt bound by these promises.

(3) Some may think that the appointment of the Study Commission by the Legislature had no other purpose than to obtain a year's delay. As to that this Court cannot say. However, the Court thinks the appointment of the Commission was a wise step and that much progress has resulted therefrom. Hearings were held in every Congressional District in Georgia, many witnesses were heard, and the purposes of the study and the situation faced by Georgia, were carefully explained to the people of Georgia by the able chairman of the Commission, Honorable John [fol. 73] A. Sibley, an outstanding attorney and banker of this state. It was reported that numerically three out of five of the witnesses favored maintaining segregation, even though it might result in abolishing the Georgia public school system. That fact alone, however, shows a decided shift in public opinion in Georgia. This Court is confident that, except for the education of the people by such Commission, the vote would have been overwhelmingly against any integration, whatever the consequences.

This Court on May 9, 1960 therefore, had the feeling that the best interests of Georgia would be served by permitting a new legislature to be elected, with full knowledge by most of our people as to the real issues involved, and the possible disastrous consequences which could flow from the failure of the Georgia Legislature to permit the Atlanta Plan to become effective.

(4) It now seems clear that the people of Atlanta and Fulton County would prefer to have said Plan put into operation, than to have Atlanta's schools closed. It is quite evident that many other populous centers in Georgia have the same feeling. This feeling is not shared by citizens living in the rural areas for two reasons. First, they do not have the residential patterns that exist in the cities, which patterns as formerly pointed out by this Court, would result in the schools located in the white areas being practically all white and those located in negro areas to [fol. 74] consist almost altogether, if not totally, of negroes. Such a situation, coupled with a Pupil Assignment Plan on

application of the students, would cause little mixing. The residential patterns in the country, however, would not give this advantage. Second, the people in our rural areas have the feeling that if any integration is permitted in Atlanta, or other city in Georgia, it will be but a beginning which will in time spread to their areas.

The danger which Georgia faces in the event that representatives of the rural communities will not permit the Atlanta Plan to become operative, is clearly and forcefully brought out by the report of the Legislative Committee, sometimes called the Sibley Committee in honor of its distinguished chairman. The report pointed out that under a similar situation in Virginia a three-judge court ruled that "no one public school or grade in Virginia may be closed to avoid the effect of the law of the land, as interpreted by the Supreme Court, while the state permits other public schools or grades to remain open at the expense of the taxpayers." See James v. Almond, 170 F.S., 331.[1]

[fol. 75] (5) This Legislative Committee recommended five specific statutes or resolutions to be passed by the General Assembly in 1961. Recommendation No. 1 and Recommendation No. 2 pertain to constitutional amendments, which if proposed to the people in January, 1961 cannot be voted upon until the general election in November, 1962, after the schools have commenced in September.

Recommendation No. 5 however, reads as follows:

> "That the General Assembly consider whether, in view of the urgency created by the Atlanta case and other cases which may be brought, it will propose to close the public schools in order to maintain total segregation throughout the state or whether it will choose a course designed to keep the schools open with as

[1] On August 27, 1960 a three-judge Federal Court in New Orleans, in the case of Bush vs. Orelans Parish School Board, et al., declared invalid a Louisiana statute which gave the Governor the right to close any school in the state ordered to integrate. The Court also enjoined the Treasurer of the State and all persons acting in concert with him from enforcing any Louisiana statute which would deny school funds of any kind to any public school in the State of Louisiana because such school has been desegregated.

much freedom of choice to each parent and community as possible; and, if it chooses the latter course, that it enact legislation enabling each school board or other local body to establish a pupil assignment plan; empowering the people of each community to vote whether to close their schools in the event of integration or to continue the operation of said schools; and enabling each parent to withdraw his child from an integrated school and have the child reassigned to a segregated school or receive a tuition grant or scholarship for private education."

That portion of Recommendation No. 5 suggesting legislation permitting the people of each community to elect as to whether they adopt a Pupil Assignment Plan, or whether they close their schools, is worthy of careful study. That is to say, should the Legislature permit Atlanta to put into effect in September, 1961 the proposed Plan, the State of Georgia would free itself of the danger which it faces, to-wit, that the closing of the Atlanta schools in September, [fol. 76] 1961 would, under application of the principles of law in the Virginia case set forth above, result in the closing of all the public schools in Georgia.

(6) The majority vote of the Legislative Committee makes it clear that the majority of the Committee are opposed to any integration, but they hold the conviction that, since integration is inevitable, it is better to allow each community of the state to decide for itself whether to risk the closing of its schools. The majority report is made by men having the best interests of Georgia's common school system at heart, and includes the Chancellor of the University System and the Superintendent of Schools of Georgia. It also includes the Chairman of the Board of Regents of Georgia, and other outstanding Georgians.

(7) This Court wishes to make it clear that the Court has no desire to meddle into the affairs of the Georgia Legislature or the State of Georgia, but is making a sincere effort to enable the people of Georgia and its legislature to make a decision in this matter, if they so desire,

that will prevent the closing of the schools of Georgia. This is a matter of grave concern to the people of Georgia and in particular, to the parents having children of school age but not having sufficient funds with which to provide a private school for their children.

This the 8th day of September, 1960.

Frank A. Hooper, United States District Judge.

[fol. 77]

IN UNITED STATES DISTRICT COURT

MOTION FOR FURTHER RELIEF—Filed April 30, 1962

Plaintiffs, by their undersigned attorneys, move this court for further relief in the form of an order enjoining defendants from continuing to maintain and operate a segregated biracial school system in the City of Atlanta, Georgia; specifically enjoining defendants from continuing to assign pupils to the public schools under their jurisdiction on the basis of race and color; and from continuing to assign teachers, principals, and other professional school personnel to the city's public schools on the basis of race and color; and from continuing to designate schools as "Negro" or "white" schools; and from continuing to support, approve or sanction racially segregated extracurricula school activities; and from continuing to maintain a dual system of school attendance area lines based on race and color; and from making any other distinctions in the operation of the public school system in Atlanta which are based on race and color.

As grounds for this motion plaintiffs show the following:

1. This action was originally filed on January 11, 1958 by the named plaintiffs on behalf of themselves and other Negroes in the public school system similarly situated.

2. The gravamen of the complaint is that the defendants [fol. 78] are "operating the public school system of Atlanta, Georgia on a racially segregated basis, pursuant to the policy, custom, usage, regulations and laws of the State of Georgia of enforcing racial segregation in

public institutions." The complaint specifically alleged that pursuant to the policy, custom and usage complained of, "Defendants have designated certain schools in the public school system of Atlanta, Georgia as schools for the exclusive attendance of white children and other schools for the exclusive attendance of Negro children. Schools for the exclusive attendance of white children are staffed by white teachers, principals and administrative personnel only. Schools for the exclusive attendance of Negro children are staffed by Negro teachers, principals and administrative personnel only."

3. The relief sought in this action was a preliminary and permanent injunction enjoining defendants from "operating the public school system of Atlanta, Georgia on a racially segregated basis and enjoining the defendants from refusing to permit the minor plaintiffs to attend any public school in the City of Atlanta, Georgia, which they are otherwise qualified to attend, solely because of their race and color."

4. On July 9, 1959, after a full trial on the merits which took place on June 5, 1959, defendants were enjoined from "Enforcing and pursuing the policy, practice, custom and usage of requiring or permitting racial segregation [fol. 79] in the operation of the public schools of the City of Atlanta, and from engaging in any and all action which limits or affects admission to, attendance in, or education of, infant plaintiffs, or any other Negro children similarly situated, in schools under defendants' jurisdiction, on the basis of race or color." However, defendants were allowed a reasonable period of time "to achieve full compliance with this Order and for bringing about a transition to a school system not operated on the basis of race."

5. Accordingly, defendants were directed to "present to this court on or before the 1st of December 1959, a complete plan adopted by them designed to bring about compliance with the Order and which would provide for a prompt and reasonable start toward desegregation of the public schools of the City of Atlanta and a systematic and effective method for achieving such desegregation with all deliberate speed."

6. Thereafter, on January 20, 1960, this court approved defendants' amended plan of desegregation which, in essence, provided for the elimination of segregation a grade a year beginning with the 12th grade and the reassignment of students to schools in the grade desegregated each year pursuant to a number of criteria set forth in the plan and approved by this court.

7. On February 26, 1960 plaintiffs moved this court for an order directing defendants to proceed with their plan [fol. 80] as finally approved beginning May 1, 1960 in order that such plan may become effective beginning with the school year in September 1960.

8. On May 9, 1960 this court entered an order denying the plaintiffs' motion with respect to the September 1960 term but granting same with respect to the September 1961 school year and providing that desegregation commence in grades 12 and 11 of said school year.

9. On September 13, 1960 this court rendered an opinion on plaintiffs' motion setting forth its reasons for denying same with respect to the September 1960 school year and granting same with respect to the September 1961 school year.

10. Thereafter, approximately nine Negro children were assigned to the eleventh or twelfth grade in schools previously limited to attendance by white pupils for the September 1961 school year.

11. All other eleventh and twelfth grade pupils and all other pupils were assigned to schools on the basis of race.

12. The nine Negro children and approximately 75 other Negro pupils had applied in May 1961 for reassignment to schools previously limited to white students. These applicants were subjected to tests not applied to the white eleventh and twelfth grade students already attending the schools to which transfers were sought and not applied to [fol. 81] any other eleventh or twelfth grade students assigned to schools in the City of Atlanta as required by the plan approved by this court.

13. Contrary to the Supreme Court's decision in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954), defendants have continued to maintain and operate a racially segregated school system in the City of Atlanta. Specifically, defendants have continued to maintain a separate system of elementary, junior high and senior high schools limited to attendance by white students. Defendants have continued to staff these schools with white teachers, white principals and other professional personnel who are white. Defendants also have continued to maintain and operate a separate system of schools for the attendance of Negro children and have continued to assign only teachers, principals and other professional personnel who are Negro to these schools. Defendants have continued to assign pupils to school on the basis of race in the 10th, 11th, and 12th grades and have continued to maintain and enforce a dual scheme of school zone lines based on race. Defendants have continued to designate and construct schools for Negro pupils and schools for white pupils. Defendants have also continued to operate, support, sanction or sponsor extracurricula school activities limited to one race. In short, defendants have not taken steps to reorganize the biracial school system in Atlanta into a unitary non-racial system as required by the Supreme [fol. 82] Court decision in the *Brown* case, supra.

14. The assignment of children to school on the basis of race in grades 10, 11 and 12 as well as all other grades is presently effected by defendants through the drawing and enforcing of school zone lines based on race. The criteria of the plan approved by this court are applied only to Negro pupils seeking reassignment to white schools. When Negro pupils are unable to attend the nearest Negro school because of overcrowding or because there is no Negro school in the area, these children are transported to a Negro school where space is available, many of them passing white schools in the process.

15. The plan of desegregation proposed by defendants in this case and approved by this Court has not been used by defendants to bring about desegregation in the public schools of Atlanta, but, on the contrary, has been used to maintain segregation.

16. The administrative remedy afforded an aggrieved applicant for transfer under the plan has proved to be inadequate to grant relief to the applicant in time for admission to the school to which he seeks transfer for the school year in which he applied. The remedy afforded is clearly inadequate to grant the relief to which the plaintiffs are clearly entitled under the *Brown* decision and subsequent decisions of the federal courts.

Wherefore, plaintiffs pray that this court will grant [fol. 83] a prompt hearing of this motion for further relief and upon such hearing will:

1) enter an order enjoining defendants from continuing to maintain and operate a segregated biracial school system in the City of Atlanta, specifically enjoining defendants from maintaining and operating "white" and "Negro" schools, and from assigning pupils to schools on the basis of race, and from assigning teachers to schools on the basis of race, and from designating and constructing "Negro" and "white" schools, and from maintaining a dual scheme or pattern of school zone lines based on race, and from supporting, approving, or sanctioning extracurricula school activities limited to one race or the other, and from continuing to make any other distinctions in the operation of the public school system of the City of Atlanta which are based wholly on race and color;

2) in the alternative, plaintiffs pray that this court require defendants to come forward with a complete plan for the reorganization of the entire biracial school system of Atlanta, Georgia, into a unitary non-racial system, which plan shall include a new plan for the assignment of pupils on a non-racial basis and a plan for the assignment of teachers on a non-racial basis, for the construction of schools on a non-racial basis, for the drawing of school zone lines on a non-racial basis, for reorganization of extracurricula school activities on a non-racial basis, and for [fol. 84] the elimination of any other discriminations in the operation of the schools of Atlanta, Georgia based on race and color.

E. E. Moore, Jr., Suite 201, 175 Auburn Avenue, N.E., Atlanta, Georgia;

Donald L. Hollowell, 859½ Hunter Street, N.W., Atlanta, Georgia;

Constance Baker Motley, Jack Greenberg, 10 Columbus Circle, New York 19, New York,

Attorney for Plaintiffs.

A. T. Walden, Of Counsel.

Notice of Motion (omitted in printing).

[fol. 85]

IN THE UNITED STATES DISTRICT COURT

DEPOSITION OF JOHN WALTER LETSON—May 21, 1962

Deposition of John Walter Letson, called as an opposite party by plaintiffs for purposes of cross-examination, taken pursuant to agreement of counsel, all formalities waived, before B. L. Pickett, Notary Public, at 1601 Bank of Georgia Building, Atlanta, Georgia, commencing at 11:10 a.m., on May 21, 1962.

Appearances of Counsel:

For the Plaintiffs: E. E. Moore, Esq. and Miss Constance Baker Motley.

[fol. 86] For the Defendants: Newell Edenfield and A. C. Latimer, Esqs., of counsel.

Miss Motley: I suppose we ought to have the record indicate that the deposition of Dr. Letson is taken on this date more or less pursuant to agreement. I think we had originally set it for the 16th of May.

JOHN WALTER LETSON, being first duly sworn, deposed and testified as follows:

Cross examination.

By Miss Motley:

Q. Dr. Letson, do you want to state your full name, please.

A. John Walter Letson.

Q. And your position?

A. Superintendent of Schools.

Q. How long have you been Superintendent of Schools here in Atlanta?

A. It will be two years the 1st of July.

Q. That was prior to the actual implementation of the court-approved plan of desegregation, was it not?

A. Yes.

Q. Do you know offhand how many students you now have enrolled in the entire school system?

A. Approximately 100,000.

Q. Do you have any idea what percentage of those students are Negro?

A. We don't keep our records that way, but it is approximately 45 per cent.

[fol. 87] Q. How many elementary schools would you say you have, approximately, in the city?

A. 115.

Q. How many junior high schools?

A. None.

Q. You don't have any junior high schools?

A. None.

Q. How many high schools do you have?

A. 24.

Q. Now, of the 115 elementary schools, approximately how many would you say are Negro?

A. I don't even know without counting.

Q. Well, would it be about 45 per cent, would you say?

A. Roughly.

Q. Now, of the 24 high schools, how many of those would you say are Negro?

A. I don't think you can divide them that way.

Q. Why not?

A. Well, how would you classify the schools that have Negro students?

Q. I don't know, how do you classify them?

A. We classify them as schools.

Q. Well, how many high schools do you have which are attended only by white students, would you say, offhand?

A. About 14.

Q. How many would you say are attended only by Negro [fol. 88] students?

A. Six.

Q. How many white high schools would you say have Negro students?

A. Four formerly white.

Q. Now, how many teachers would you say you have all told in the system?

A. 3500. These are approximate figures.

Q. Yes, of course, I understand. We can get the actual figures later. I don't know as it makes too much difference.

Approximately how many of those 3500 teachers would you say are Negro?

A. Approximately 45 per cent.

Q. Now, you say you became the superintendent in July, 1960, is that right?

A. Right.

Q. All right, and in September, 1960 how were these elementary schoolchildren assigned to the 115 elementary schools?

A. On the basis of their previous attendance.

Q. You mean students already enrolled were reassigned?

A. Yes.

Q. What about new students?

A. They were assigned on the basis of the area in which they lived in relation to the attendance of their neighbors.

Q. In other words, you have—

[fol. 89] A. Now, you are talking about '60 or '61. You said '60.

Q. I am sorry. I thought you said you became superintendent July, 1960.

A. I did.

Q. Well, this is September, 1960. That is after you became superintendent?

A. Yes.

Q. Right?

A. Yes.

Q. All right, and I am trying to determine how elementary school children were assigned to the 115 elementary schools in September, 1960.

A. Pupils who had attended a school previously were assigned to the same school. Those who were beginning students were assigned to the same school attended by their neighbors.

Q. Now, how were these new students able to determine the school to which they might go? That is, did they just ask their neighbors or did they inquire of the Board or what?

A. Some of both.

Q. Some of both?

A. Yes, but in general it was automatic on the basis of their understanding. They had brothers and sisters in the area in which they lived.

Q. Do you have any school attendance area lines for each of these elementary schools?

A. Not official attendance lines. There are administrative [fol. 90] lines drawn by individual schools on occasion to equalize the load in various schools.

Q. And by whom are these administrative lines drawn?

A. By the area superintendent in cooperation with the school officials, local school officials.

Q. And these lines serve to delineate the area for particular elementary schools?

A. Yes, to the degree that it is necessary to balance one school's attendance.

Q. Now, in the areas where the housing is mixed racially, that is, the areas where Negroes and whites live in the same area, these lines would overlap, so to speak, wouldn't they?

A. Well, formerly they were drawn separately for white and Negro schools.

Q. And how are they drawn now?

A. They are drawn on the basis of the Pupil Placement Law under which we are operating. There has been no change in the elementary situation.

Q. Now, you say the lines are drawn now pursuant to the Pupil Placement Laws. Is that a state law or is that the plan?

A. That is the plan.

Q. And you say the lines are drawn pursuant to that?

A. The same lines that were in existence in 1960 are in existence at the present time.

Q. I see.

[fol. 91] A. With variations that have been made. There have been no specific change in those lines.

Q. And you still have separate lines which relate to the Negro schools and separate lines which would relate to the white elementary schools; is that right?

A. Roughly, yes.

Q. Okay. Now, you say you don't have any junior high school system?

A. We have no junior high schools.

Q. Your elementary schools go from grades 1 through 8?

A. Through seven.

Q. One through seven?

A. Yes.

Q. And high school is grade 8 through 12?

A. Right.

Q. Now, how are children assigned to the 24 high schools, or how were they assigned to the 24 high schools in September, 1960, that is, right after you became superintendent?

A. On the basis that I previously said. The school that they attended, the school that they formerly attended, and new students in relation to the same arrangement as their neighbors.

Q. In other words, those who are already enrolled in the high schools were reassigned to the high schools?

A. Right.

Q. Now, what about those who were graduating from [fol. 92] elementary school, how did they get assigned to a high school?

A. Roughly on the basis of the high school that had traditionally served that elementary school.

Q. You have sort of a feeder system where certain elementary schools would feed into certain high schools?

A. Yes.

Q. And, of course, the Negro elementary schools would feed into one of these six Negro high schools?

A. Yes.

Q. And the white elementary schools would feed into one of these eighteen white or formerly white high schools?

A. Right.

Q. Is that the way these high school students are now assigned to the schools?

A. The same way, except they are subject to transfer upon request.

Q. Now, I believe it was September, 1961 when the plan of desegregation approved by the Court went into effect; isn't that right?

A. Right.

Q. And that plan, as I recall, related to grades 11 and 12?

A. Correct.

Q. Now, how were children assigned to Grades 11 and 12 in September, 1961 when the plan went into effect?

A. They were assigned to the school that they had formerly attended and told that if they wished, they could [fol. 93] request a transfer from that assignment.

Q. All right. Who told them that they could request a transfer?

A. Well, it was basically a part of the plan under which we were operating, copies of which were widely distributed.

Q. Did you send any written communication to the parents of children in grades 11 and 12 in September, 1961?

A. Not on this particular point, no.

Q. Did you put any announcement in the paper to the effect that students in grades 11 and 12 might apply for transfer?

A. Well, there was considerable publicity about it and it was wide understanding that that was the case. It had been announced officially on several occasions; orally, I don't think it was sent out in a written notice.

Q. Well, let me ask you this, whether you as a superintendent sent to the local newspapers something which you prepared in the form of an announcement to the parents of children in grades 11 and 12, they had the right to transfer?

A. There was an official action by the Board of Education that was made public.

Q. Well, I will get to the Board in a minute. I was trying to clarify whether the superintendent had sent any such notice.

A. I don't think there was a formal announcement to that effect, but there was certainly no lack of complete under-
[fol. 94] standing on the part of school personnel and others that that was the case.

Q. Now, you say you think the Board made a formal announcement of this fact in September, 1961 that students enrolled in grades 11 and 12 might transfer?

A. Not in September. The Board of Education established the implementation of the plan by official action previous to May 1st of 1961.

Q. Well, prior to May 1st, 1961 do you recall the Board making any written communication to be published on the radio, in the papers, television, to the fact that people in grades 11 and 12 might transfer?

A. Yes, the plan was available to the radio and newspaper.

Q. What I am trying to get at, Dr. Letson, is whether a written statement of some kind was prepared by the Board setting forth these facts that students in grades 11 and 12 might apply for transfers. What I would like to get, if you had some such statement, I would like to get a copy of it. Do you have something which the Board prepared for public consumption announcing this fact?

A. This fact was included in an action by the Board to setting up additional facts relating to the implementation of this plan, and it was made available to the public and to anyone else of interest.

Q. Do you still have copies of that?

A. Yes. I don't think I have them with me.

[fol. 95] Q. No, I understand.

A. But I have copies available.

Q. I was just trying to determine what there is available.

A. Yes, there are copies available.

Q. All right now, prior to May, 1961 did you meet with the principals of the high schools on this desegregation plan?

A. Many times.

Q. Did you meet with the teachers?

A. Yes, not all the teachers. It was discussed in a television presentation over our educational television, and it was discussed at a general principals meeting, both white and colored.

Q. Now, in May, 1961 when the pupils desiring to transfer were required to make application for same, do you recall how many students applied for transfer in grades 11 and 12 at that time?

A. Approximately 300 requested applications and approximately 130 actually turned them in.

Q. Were these Negro and white students, the 300?

A. Yes.

Q. And 130 were turned in?

A. Yes.

Q. How many of these 130 were Negro and how many white?

A. 129 Negro and one white.

Q. Do you have the request for transfer forms of these [fol. 96] 130 students?

A. Yes.

Q. In the case of the 130 who requested transfer, what procedure was followed with respect to these students in effecting their transfer?

A. They were given, asked to report for a specified time and were given a general achievement test.

Q. Is this the same general achievement test which is given periodically in the school system?

A. Yes.

Q. What other tests were they given?

A. Following that general achievement test there were 47, I think, administered a second test that was also an achievement, but it was a different test.

Q. 47 were given a special test?

A. A second test.

Q. Do you have a name for it or some way of identifying the test?

A. I think it is referred to as SCAT, S-C-A-T. That may have been the first one, I am not positive.

Q. And this second test was also an achievement test?

A. Yes.

Q. Is this a test normally and usually given in the school system?

A. Yes.

Q. Now, this one white student, was he included among [fol. 97] those given a test?

A. Yes.

Q. What school did he seek to transfer to?

Mr. Edenfield: Off the record. It was a girl.

A. Requested to transfer from Northside High School to Dykes High School.

Q. Is that the girl whose case is now in appeal with the State Board and so forth?

A. It was the subject of litigation. I don't know the stage of it at the moment.

Q. Is Northside a white high school?

A. No.

Q. It is one of the schools to which Negroes have been admitted now?

A. Yes.

Q. What about Dykes?

A. There have been no Negroes admitted to Dykes as yet.

Q. How do you spell Dykes?

A. D-y-k-e-s.

Q. Was she given a test, also?

A. Yes.

Q. Now, you say 47 were given a separate test. What about the rest—

A. A second test.

Q. A second test. What about the remainder, they weren't given a second test?

[fol. 98] A. They were not given a second test.

Q. That is about 83, if my arithmetic is right?

A. Approximately, yes.

Q. What happened to those 83?

A. They were not eliminated from the transfer procedure at that stage of the game but they were not given the second test. There was a plan followed by which the 47 were selected and the others were not included.

Q. Well, were the others reassigned to the schools that they were already attending?

A. Their request for transfer was not approved.

Q. All right. Now, let's get to the 47, what happened to them after they took the second test?

A. They were—their results, test results were evaluated and a portion of that group was requested to come in for an interview.

Q. Do you know how many?

A. At the moment I do not recall. It was approximately half of that group.

Q. They were requested to come in for an interview, you say?

A. Yes. There was an interview committee set up.

Q. Now, who composed the committee that you—the interviewing committee?

A. The deputy superintendent, area superintendents, and certain principals.

[fol. 99] Q. How were the principals selected?

A. The schools that were involved in the requested transfer.

Q. What took place at these interviews?

A. The students were asked general questions about their reasons for wanting to transfer, their educational purposes, their activities as far as their school work was concerned. The general purpose was to get a general evaluation of the students in terms of personality.

Q. Now, the other half of the 47 who were not requested to come in for interview, what happened to them?

A. It was a process of the selection procedure and they were ultimately denied transfer.

Q. Now, on the 83 who were first denied transfer, what basis were they denied transfer on?

A. They were not at that stage—let me repeat, they were—an effort was made to determine the average achievement for the grade in which they were requesting to transfer at the school to which they were requesting to transfer. Included in the list of those that were to be considered further were those that came up to or exceeded the average, the median for the grade they were requesting. Then there was a 10 per cent allowance, if they came within 10 per cent of the median of the class, their names were included. Then if they met or exceeded the national norm in terms of achievement for that grade, their names were included in [fol. 100] the list, and that is how the list of 47 was selected.

Q. Now, how were the half of 47 that were requested to come in for interviews selected?

A. On the basis of their scores, on the basis of their reason for transfer and on the basis of their proximity to the school that they were requesting assignment to.

Q. All right, now, of the half of 47 who were requested to come in for interview, what happened to that half after the interview?

A. Some were selected, some requests for transfer were approved, others were denied.

Q. How many would you say of the, I guess that would be about 24, let's say, who came in for interview, that would be about half of 47, how many of those would you say were approved?

A. Ten.

Q. What was the basis for approving these ten and rejecting the other requests?

A. The basis, as indicated above, their reasons for wanting to transfer, their achievement in relation to the norm for the school to which they were requesting a transfer, and their proximity to the school.

Q. Now, to which of the high schools were these ten assigned, do you remember?

A. To four high schools, Murphy, Brown, Grady and Northside.

[fol. 101] Q. How many were assigned to Murphy?

A. Three, I think.

Q. And Brown?

A. Two.

Q. Grady?

A. Two.

Q. And Northside?

A. Three. Does that total properly?

Q. Yes, that is ten. And these were all formerly white high schools?

A. Yes.

Q. Now, were there any Negro students in May of 1961 when this plan went into effect who sought the transfer in grades 11 and 12 to other Negro high schools?

A. No.

Q. Were there any white students at that time who sought to transfer in grades 11 and 12 to other white high

schools other than this white, one white student you mentioned before?

A. That is the only one.

Q. This second achievement test, which you called SCAT, I think, S-C-A-T, you say that is a test generally applied periodically in the school system?

A. Yes, it was a test that has been used and given in the school system. I am not certain that it has been given generally to everybody at any one time.

[fol. 102] Q. Does it serve some special purpose in the school system?

A. No, it is not an unusual test. There was elements in it more in the area of an intelligence test than the former one. The second one was more an intelligence test than the first one.

Q. But the first one was a general achievement test?

A. That is correct.

Q. To determine whether the student was performing at his or her grade level?

A. Correct.

Q. Then the second one was an intelligence test?

A. Yes.

Q. All right, and this intelligence test you say is given sometimes?

A. Yes, it has been used in the school system but not generally for all the students.

Q. Was it given to the students in grades 11 and 12 in May, 1961 when these Negro students sought transfer there? That is, was it given to the white students in Murphy, Brown, Grady and Northside?

A. I wouldn't—I couldn't say at the moment. I would have to check.

Q. Now, of the approximately 120 students, I guess, Negro students who applied for transfer and who didn't get in, did any of those students appeal the denial of their request for transfer?

[fol. 103] A. Yes.

Q. How many would you say?

A. 38, as I recall.

Q. What happened to their appeals, do you know?

A. It was appealed to the Board of Education, as specified. The Board upheld the Superintendent's original rec-

ommendation. It was appealed to the State Board of Education. The State Board of Education returned it to the Atlanta Board of Education for further information upon which the 38 were denied transfer.

Q. What happened after that?

A. It has been subject to further hearing by the Board of Education since that time, with the information having been given that the Board was ready to hear it.

Q. But the Board hadn't heard it?

A. No.

Q. Now, in May of 1962 have you had any requests in grades 10, 11 and 12 for transfer?

A. Yes.

Q. How many would you say?

A. Approximately 300.

Q. Are these Negro and white?

A. I am not certain whether any white are included in that group or not.

Q. What is the present status of those applications for transfer?

[fol. 104] A. They are in the process of being evaluated.

Q. Have they been given any tests?

A. No, we aren't planning to give any tests this year.

Q. What are you planning to do?

A. The announcement was made that there would be no special tests and that we would utilize the test scores that were already available in the schools.

Q. Are any other criteria going to be applied to these 300, such as proximity to school?

A. That will certainly be taken into consideration in the evaluation, but there is no positive policy related to it. Just as there were exceptions last year in terms of proximity for justifiable educational reasons.

Q. Are there any other criteria that you can think of that would be applied to these 300 who have applied for transfers in September, 1962?

A. The test scores in proximity to school, subject to variation for educational reasons, plus an interview that will be a part of the procedure.

Q. Same interview committee?

A. Not necessarily the same personnel but generally constituted in the same way.

Q. The test scores are going to be used in the same way that they were last year, that is, to determine whether the transferee scores a grade which is the average for the class in the school to which he seeks to transfer, as you explained [fol. 105] it before?

A. That same calculation I am certain will be made. It doesn't necessarily mean that it will apply as rigidly this year as it has in the past.

Q. Do you know how many schools would be involved as a result of the requests?

A. I think all of our high schools other than two and possibly three.

Q. What would those be?

A. Dykes, East Atlanta and Therrell. So far as I know, there were no requests to transfer to those three schools.

Q. In other words, all the other white high schools would be involved?

A. Yes.

Q. These are requests by Negroes to transfer to white schools?

A. So far as I know, white and formerly white.

Q. Yes. Now, in May of this year, or prior to the first of May of this year, did the Board make any announcement to the effect that students in grades 10, 11 and 12 were eligible to transfer?

A. A principals meeting was used as a means of discussing the procedure with all concerned.

Q. But did the Board prepare any formal statement?

A. There was no formal announcement because the placement plan, copies of it had been made generally available [fol. 106] and everyone was well aware of the procedure.

Q. And your office then didn't send out any formal written anouncement?

A. No, but did take the initiative in calling a meeting to specifically discuss the details.

Q. With the principals?

A. Yes.

Q. How about the parents of these students, did you meet with them?

A. Not formally in terms of all of the parents, but there have been meetings throughout the year with PTA's and other groups where questions have been asked about the procedure.

Q. Now, let me ask you this, the Negro teachers are still assigned to Negro schools and the whites to white schools, aren't they?

A. Formerly white schools, yes.

Q. And those which are still all white, have only white teachers?

A. Yes.

Q. How are teachers assigned? Are they assigned by the Board or do you do that as the superintendent?

A. They are elected by the Board. They are assigned to specific positions by the superintendent and administrative staff.

Q. Do you have any Negroes on your administrative staff?

A. Yes.

[fol. 107] Q. How many?

A. I have an area superintendent, pupil personnel service has two; a number of resource teachers who are Negro.

Q. What are these resource teachers?

A. They are members of the staff in one or more of the five areas we have in the city of Atlanta.

Q. Do they teach a specialty?

A. They are supervisors in reality.

Q. Oh, supervisors?

A. They serve as helping teachers and supervisors.

Q. This Negro area superintendent you have, what area does he supervise?

A. Area 1.

Q. Are there any white schools under his jurisdiction?

A. No.

Q. Now, these Negro resource teachers that you mentioned, do they have any supervisory function over the white schools?

A. No.

Q. Are these, what did you call them, personnel?

A. Resource teachers?

Q. No, I think there were three categories.

Mr. Latimer: Pupil personnel.

A. Pupil personnel.

Q. How about these Negro pupil personnel teachers—

A. They are a part of the staff of the central office and work in the area of pupil problems, emotional problems and [fol. 108] related areas.

Q. Do these Negro pupil personnel teachers take care of students of the white schools or just Negro schools?

A. Mainly Negro but I am certain that on occasions they have worked with both. Also, I might add, these resource teachers are responsible for teaching in-service training courses.

Q. For the teachers?

A. For teachers.

Q. Do the Negro and white teachers meet jointly in these in-service training courses?

A. In some cases, yes.

Q. In what cases?

A. There is no particular pattern. It depends on the course that is being taught and the degree to which there is a desire on the part of the teachers to take it.

Q. Well, you mean a course is offered and any teacher is eligible to attend?

A. In general, that is true. We have been in the process of changing it during this past year, and the change has not been 100 per cent.

Q. What are you changing, I don't understand?

A. We are changing the separation of white and Negro teachers and in-service training courses.

Q. Now, what about Negro principals? Of course, I assume that you still have only Negro principals in the Negro [fol. 109] schools and white principals in the white schools; is that right?

A. Yes.

Q. What about the extra-curricular activities like the Science Fair, do you still have separate competition for Negro and white students?

A. Yes, this year.

Q. Let's see, I think there was also a band contest or something like that that was separate, do you still have those?

A. We do not have a band contest as a city-wide activity. It comes in an area, larger area, but they were separate

Q. Let me ask you this, have you converted any white schools, elementary schools recently to Negro units?

A. What do you mean by recently?

Q. Well, since you have been superintendent.

A. Yes. They were converted to relieve an overcrowded situation in a nearby school. This was no specific race delineation in doing so. Mayson was one, and it is now attended by all Negro pupils.

Q. When was that converted?

A. In January of 1961. It is anticipated that one elementary school will be used to relieve the overcrowded situation at Collier Heights beginning in September.

Q. What is the name of the school?

A. Margaret Fain.

[fol. 110] Q. Is that white?

A. Yes.

Q. That will be converted in September, '62, you say?

A. Yes.

Q. All right, what about high schools?

A. None.

Q. Have there been any high schools opened since you have been superintendent?

A. Yes, two.

Q. What are they?

A. Dykes and Therrell.

Q. Are those both white?

A. Yes.

Q. Now, on the elementary school level, Mayson and Fain are the only conversions since you have been superintendent?

A. Whitefoord is another.

Q. Whitefoord?

A. Yes.

Q. Is that going to be converted to relieve overcrowding in some Negro schools, or has been?

A. It has been, yes.

Q. What area was that?

A. It was done last September.

Q. What area was involved, what Negro school, rather?

A. Reynolds, Wesley.

Q. And that is all of the elementary schools?

[fol. 111] A. I think I am correct that that is it.

Q. And there have been two white high schools opened since you have been superintendent?

A. Yes.

Q. How about Negro high schools?

A. None.

Q. Do you have any charts or statistics which would show the enrollment in each high school in the capacity?

A. We have attendance reports.

Q. That would show that?

A. That are required each year by the State that shows the attendance by schools.

Q. What is the latest one, would you say? Would it be May this year, or what?

A. We have a monthly report that also would be in at the end of May, and our annual report will be completed soon after the close of this school year, but it is prepared each month.

Q. But you would have then a report for the month of May, 1962?

A. We will at the end of May.

Q. Do you have one for April, 1962?

A. I am not certain whether it has been completed as yet, but it will be available.

Q. What is the last completed one that you know?

A. Well, to be safe I would say March.

[fol. 112] Q. March, '62?

A. Yes.

Q. You have an attendance report which would show each school, the enrollment and the capacity?

A. It would show the enrollment. It would not show the capacity.

Q. Do you have anything that shows the capacity?

A. We have a report or could get a report that would show the number of classrooms in each school.

Q. Well, what I am trying to get at is something which would show which of your schools were overcrowded and which were not. Do you have anything that shows that?

A. We have a statement that shows the number of classrooms available, or can accumulate or get such a statement, and then the attendance report which would show the number of pupils in that school.

Q. The same would be true for the elementary schools?
A. Yes.
Q. Do you have anything which would show the teacher-pupil ratio in your schools?
A. Yes.
Q. Do you have any present school construction plans?
A. We have a proposed bond issue based upon our estimate of school building needs.
Q. Is that a document that is available?
A. Yes.
[fol. 113] Q. Let me ask you this about the teachers, do Negro and white teachers have to meet the same standards for employment in the system?
A. Yes.
Q. How about the principals?
A. The same.

Miss Motley: I think that is all, Dr. Letson. Thank you.
By agreement of the parties the Superintendent will give the following information, and I will go over it and if you have any objection, you can note it.
The Witness: No objection at all.
Miss Motley: First of all, I would like to get the total enrollment. I suppose you have that?
The Witness: Yes.

By Miss Motley:

Q. The percentage of those that are Negro, number of schools. I think we have 115 elementary and 24 high schools.
A. I would like to check that, too.
Q. Then the second thing will be the total number of elementary schools, total number of high schools, total number of elementary schools that are Negro and total number of high schools that are white, total number of high schools which are Negro and total number which are mixed.
A. Well, now, you realize there is no such designation any more. Do you want me to designate them as "formerly [fol. 114] white"?
Q. Yes.
A. And there is no difference in the attendance calculation for those schools that are integrated in terms of white and colored.

Q. I don't know if I follow you.

A. We do not keep statistics white and colored for those schools.

Q. Well, for the mixed schools.

A. Yes.

Mr. Edenfield: For any of them.

A. For any of them, yes.

Q. Well, you said there were 14 schools, high schools, which are attended wholly by white students, I thought I understood you to say.

A. I think that is the correct figure, but we do not separate attendance figures in white, to white and colored.

Q. I understand.

A. So in getting you what you want and what you are requesting, I may not be able to do it in exactly the way you are asking it. I can tell you the schools that were formerly all white and I can tell you those that are now attended exclusively by Negro and exclusively by white students.

Q. Yes, that will be all right.

A. But the attendance record will not be in that manner.

Q. Now, the next thing, I guess, will be the fourth item, [fol. 115] we would like to get the correct number of teachers, that is, total number, and the correct number of Negro teachers. I think you said about 45 per cent Negro. Well, if you have a figure, we would like to get that.

Do you have any maps showing these administrative lines that you refer to for the elementary schools?

A. Not in the central office. Each area superintendent has a rough sketch, but I don't think it is on a map even there.

Q. What is it on?

A. It is just a delineation of where the lines are.

Q. Well, we would like to get a copy of those. And I think you said there was a board statement in May, 1961?

A. Right.

Q. Concerning the right to transfer in grades 11 and 12. We are going to get a copy of that?

A. Yes.

Q. We would also like to get a copy, and we would be glad to do this at our expense if that is a problem, of the 130 requests for transfer made in May, 1961.

Mr. Latimer: You have already got that.

Miss Motley: We do?

Mr. Latimer: You have got everything we have got on it.

Mr. Moore: I think perhaps we do have a copy of that.

Miss Motley: I didn't know we did. That is all right, [fol. 116] then.

The Witness: I think you do, at least everything we have has been made available.

By Miss Motley:

Q. The other thing I wanted to get settled was whether this second test which you refer to as SCAT, an intelligence test, was given to the students in Murphy, Brown, Grady and Northside in grades 11 and 12 in 1961.

A. All right.

Q. And then we would like to get the latest attendance report for 1962. You said you thought it was March or might be April. Whichever is the latest, we would like to get that. Then we would like to get the report which shows the capacity of each school, elementary and high school. Then we would like to get the report which shows the pupil-teacher ratio of each school or class in each school. Then we would like to get a copy of the school construction program which you refer to, the most recent one. And I believe that is all.

Do you gentlemen have anything you would like to say on the record?

Mr. Edenfield: Not a thing that I know of.

JOHN WALTER LETSON

Subscribed and sworn to before me this day of , 1962.

....., Notary Public, My Commission Expires .

[fol. 117] *Duly sworn to by B. L. Pickett, jurat omitted in printing.*

[fol. 118]

IN UNITED STATES DISTRICT COURT

DEFENDANTS' RESPONSE TO MOTION OF PLAINTIFFS—
Filed May 24, 1962

Come now the defendants in the above stated case and file this their response to the motion filed by plaintiffs therein as follows:

1.

Insofar as Paragraphs 1 through 9 of plaintiffs' motion purport to give a history of this litigation, the original issues therein and the previous orders entered by the Court, said paragraphs are admitted.

2.

Paragraphs 10 through 16 of plaintiffs' motion are denied. Further answering said paragraphs defendants show:

a) That they have complied with the letter and the spirit of the previous orders of this court, including the placement plan previously approved by the Court;

b) Defendants deny that they have "assigned" children to particular schools either on the base of race, color or otherwise, the fact being that the placement plan previously approved by this Court contemplated and provided that students in the Atlanta School System should continue to attend the schools which they were already attending, except that said plan provided [fol. 119] that in the 11th and 12th grades students might apply for transfer, as contemplated in said plan. Defendants show that for the school year 1961-1962, one hundred thirty four (134) students did apply for transfers pursuant to said plan and that said applications for transfer were considered by the defendants, according to the criteria specified in the plan approved by the Court, after which ten (10) of said applications were granted and one hundred twenty four (124) were denied;

c) Defendants deny that they have continued to maintain and operate a racially segregated school system in the City of Atlanta and show on the contrary that they are proceeding with all deliberate speed to integrate the school system in accordance with the previous orders of this Court;

d) Defendants deny that they have continued to designate and construct separate schools for the negro pupils and the white pupils, the fact being that all reference to race in the records and construction program of defendants having been eliminated;

e) Defendants deny that they have "assigned" pupils on the basis of race through the drawing and enforcement of school zone lines based on race;

[fol. 120] f) Defendants deny that the criteria of the plan approved by this Court are applied only to negro pupils seeking re-assignment, the fact being that such criteria have been applied to both white and colored children who applied for transfer impartially and without regard to race;

g) Defendants deny that the plan approved by this Court has been used or is being used to maintain segregation in the public schools of Atlanta, the fact being that said plan has been applied by defendants, in accordance with its letter and spirit, so as to bring about a planned transition from segregated to desegregated schools;

h) Defendants deny that the administrative remedy afforded to plaintiffs, and to the class they represent, is inadequate in any respect;

i) Defendants deny that teachers and staff personnel have been assigned on the basis of race, the fact being that teachers in four high schools of the Atlanta system are now teaching integrated classes and that, as the plan approved by this Court is consummated the [fol. 121] number of integrated classrooms and hence the number of integrated staffs will be increased;

j) Defendants deny that they have maintained segregation of the races in extra curricular activities associated with the Atlanta School System, the fact being that integration has already taken place in Parent-Teacher Associations, lunchrooms, faculty meetings, honor day banquets and elsewhere, and that further integration of extra curricular activities will take place as the plan proceeds.

k) Defendants further deny that they require negro pupils seeking transfers to take tests not required of other students, white or colored. Defendants admit that such special tests were given applicants for transfer for the school year 1961-62. However, for the school year 1962-63 applications for transfer will be considered on the basis of tests given to all students, not on the basis of special tests given only to students seeking transfer. Defendants further show that this policy was adopted and publicly announced long before the present motion was filed.

3.

Further answering defendants show that Plaintiffs' mo-[fol. 122] tion is, in substance and effect, an attack upon the previous orders of this Court and upon the plan of desegregation approved by this Court, which orders and which plan have now become final and binding upon Plaintiffs and upon the class that they represent.

Wherefore, Defendants pray that Plaintiffs' motion be overruled and denied.

J. C. Savage, Newell Edenfield, and A. C. Latimer, Attorneys for Defendants.

[fol. 150a]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' PROPOSED PLAN OF DESEGREGATION—
Filed July 20, 1962

Come now the plaintiffs, by their undersigned attorneys, and propose that the Atlanta public school system be desegregated in accordance with the following plan:

1. Beginning in September 1963 all students and all professional personnel in the 22 high schools of the City of Atlanta (grades 8, 9, 10, 11 and 12) shall be reassigned in accordance with the following:

(a) School zone lines will be drawn for each high school in the city. These lines will be drawn with a view to assigning to each high school that number of students which corresponds to the normal capacity of the school. In determining the children to be assigned to each high school, the children living in the immediate vicinity of each school shall be counted and assigned thereto without regard to race or color until the capacity of the school is reached.

(b) The regular and special teachers, the counselors, the principals, and the supervisors presently assigned, or to be assigned, to high schools in September 1963 will be reassigned prior to the opening of school in September 1963 on the basis of qualification and need and without regard to race or color. All tenure and seniority rights to be observed.

[fol. 150b] 2. Beginning in September 1964 all pupils and personnel in grades 4, 5, 6 and 7 will be desegregated in the same manner in which grades 8, 9, 10, 11 and 12 are desegregated as set forth above.

3. In September 1965 all pupils and personnel in grades 1, 2 and 3 shall be desegregated in the same manner in which the other grades are desegregated as set forth above.

4. As each category of grades is desegregated, all school sponsored, school related, school supported, school sanctioned extra-curricular school activities shall be open to all

qualified students without regard to race or color. No school activity shall receive school support, sanction, direction, or approval, which is limited to students of one or the other racial group.

5. As each category of grades is desegregated, all in-service training courses for teachers, principals, supervisors, counselors, and special teachers shall be opened to all qualified teachers without regard to race or color.

6. Special teachers and counselors, as well as regular teachers, will be assigned to their specialties or supervisory positions without regard to race or color.

7. Defendants are free to speed up the desegregation process whenever, in their judgment, additional grades or activities should be desegregated and teachers reassigned without regard to race.

[fol. 150c] 8. The court will retain jurisdiction of this cause to secure full implementation of this plan and the governing constitutional principles.

Respectfully submitted,

E. E. Moore, Jr., Suite 201, 175 Auburn Avenue N.E., Atlanta, Georgia;

Donald L. Hollowell, Cannolene Building (Annex), 859½ Hunter Street N.W., Atlanta, Georgia;

Constance Baker Motley, Jack Greenberg, 10 Columbus Circle, New York 19, New York,

Attorneys for Plaintiffs.

A. T. Walden, Of Counsel.

[fol. 151]

IN UNITED STATES DISTRICT COURT

Hearing on Motion for Further Relief—July 31, 1962

Atlanta, Georgia

Before Honorable Frank A. Hooper, Judge.

APPEARANCES:

For Plaintiffs: Mrs. Constance Baker Motley, Donald L. Hollowell, E. E. Moore, Jr.

For Defendants: Newell Edenfield, A. C. Latimer.

* * * * * * *

[fol. 152] Mrs. Motley: We would like to call Dr. Letson, Your Honor.

The Court: All right.

DOCTOR JOHN W. LETSON having first being duly sworn, and called as a witness in behalf of the plaintiffs, testified as follows:

Direct examination.

By Mrs. Motley:

Q. Dr. Letson, will you please state your full name and position for the record.

A. John W. Letson; Superintendent of Schools in Atlanta.

[fol. 153] Q. Dr. Letson, do you recall that on May 21, 1962, of this year, the plaintiffs' attorneys took your depositions?

A. Yes, I do.

Q. Have you had an opportunity to read over your deposition?

A. Yes.

Q. Did you sign the original? Do you recall?

A. Yes, I did.

Mrs. Motley: Your Honor, we would like to offer the deposition of the Superintendent in evidence for the admissions contained therein.

The Court: I think that's all right. Is there any portion of it that's objected to? I'll consider the entire deposition if—

Mr. Edenfield: I don't believe there was an objection in it, Your Honor.

The Court: No, and counsel for either side may use any portion of it that they see fit.

By Mrs. Motley:

Q. Dr. Letson, do you recall that during the course of your deposition I asked you about the applications for transfer in May, 1961?

A. Yes.

Q. I'd like to show you this sample application for transfer and ask you if this is the application which you used in May, 1961?

A. Yes, it is.

[fol. 154] Q. Does that application request the race of the applicant?

A. It has the blank on the form; yes.

Q. For the race of the applicant?

A. Yes.

OFFERS IN EVIDENCE

Mrs. Motley: We'd like to have this marked and we would like to offer that in evidence, Your Honor.

The Court: It's admitted.

• • • • • • •

[fol. 176] By Mrs. Motley:

Q. Dr. Letson, I'd like to show this application for admission, assignment or transfer, and ask you if that is a 1962 application for admission, assignment or transfer.

A. Yes, it is, with the comment that we did not require a notary—notarization of the application.

Q. You also struck out a requirement of the name of the mother's employer, the name of the father's employer, and

the name of the employer of the legal guardian of the applicant?

A. Yes.

Mrs. Motley: I'd like to offer that in evidence, Your Honor.

The Court: It's admitted.

Clerk: Plaintiff's Exhibit 2.

By Mrs. Motley:

Q. You recall, Dr. Letson, don't you, that on your deposition you were not certain of the exact number of schools in the system, exact number of negro elementary schools, white, and so forth, and you agreed to furnish that information?

A. Yes.

Q. I will show you that sheet of paper and ask you whether you furnished that information to us regarding the correct number of schools.

[fol. 177] A. Yes.

Mrs. Motley: This document, Your Honor, shows the number of negro and white schools and number of integrated white schools and so forth.

The Court: It's admitted. 3.

Clerk: Plaintiffs' Exhibit No. 3.

Mr. Edenfield: Does it refer to them as "negro" and "white" schools, if I may inquire?

Mrs. Motley: Yes, it does.

Mr. Edenfield: Well, if it makes any reference to them being assigned on that basis—if they are talking about in fact who attends it, we have no objection but—

The Court: Well, any conclusions she might have made are not admitted. Of course, the document will speak for itself.

Mr. Edenfield: All right, sir.

By Mrs. Motley:

Q. Now Dr. Letson, I believe we asked you on your deposition the procedure which was followed with respect to the assignment of students in 1961. Do you recall that?

A. Yes.

Q. And I believe you subsequently sent to Mr. Moore a letter setting forth that procedure in writing?

A. Right.

Q. Is that a copy of the letter you sent to Mr. Moore?

[fol. 178] A. Yes, it is.

Mrs. Motley: We would like to offer this in evidence, Your Honor.

The Court: It's admitted.

Mr. Edenfield: Let me see that.

Mrs. Motley: Sure.

Mr. Edenfield: I don't know that I've ever seen it.

Mrs. Motley: Sorry.

Mr. Edenfield: No objection.

Mrs. Motley: We would like to offer this.

Clerk: Plaintiffs' Exhibit 4 marked "admitted."

Mr. Edenfield: What's the number of that, Mr. Clerk?

Clerk: Number 4.

By Mrs. Motley:

Q. I would like to show you these two mimeographed documents, Dr. Letson, and ask you if you are familiar with those.

A. Yes.

Q. Will you please indicate what the first one is?

A. Administrative regulations relating to the implementation of the pupil placement plan.

Q. Was that a regulation adopted by the Board?

A. I'm not certain, Mrs. Motley, that it was officially adopted. It was presented to the Board for information.

[fol. 179] Q. Was that procedure—

A. I don't think—

Q. I'm sorry.

A. —that it was adopted.

Q. Was that a procedure which you followed?

A. In 1961; yes.

Mrs. Motley: We would like to offer this first one, Your Honor.

By Mrs. Motley:

Q. Now would you explain this—

Clerk: Plaintiffs' Exhibit 5.
The Court: That's admitted.
Mrs. Motley: 5.

By Mrs. Motley:

Q. Would you explain what the second one is please, Dr. Letson?

A. Also a report for general information about the implementation of the pupil placement plan in 1961.

Q. Was that document prepared under your supervision?

A. Yes.

Q. Or by you?

A. Prepared under my supervision.

Mrs. Motley: We would like to offer this.
The Court: 6. Plaintiffs' 6. It's admitted.
Mr. Edenfield: Mrs. Motley, may I see that?
Mrs. Motley: Yes, sir.

[fol. 180] Mr. Edenfield: I don't know that I've seen it. I'm sorry. Go right ahead. I just—

By Mrs. Motley:

Q. Now Dr. Letson, on your deposition—

Clerk: Excuse me. Don't get—
Mrs. Motley: Excuse me.
Clerk: —too far ahead of me.
Mrs. Motley: Yes?
Clerk: Number 6 identified.
Mr. Edenfield: I have no objection to this. Is it clear that this concerns 1961?
Mrs. Motley: Yes, I think—

By Mrs. Motley:

Q. Dr. Letson, that's a report of the disposition of the applications made in May, 1961, is it not?

A. That's correct.

Q. You recall, Dr. Letson, on your deposition that we requested you to give us information regarding the capacity of each school in the Atlanta Public School System, the enrollment in each school, the teacher-pupil ratio of each school?

A. Yes.

Q. Let me show you this document. You can disregard the—what's written in pencil—and ask you if you furnished us with that information regarding the capacity of each school.

[fol. 181] A. Yes, we did.

Q. Now, I'd like to show you this second document and ask you to explain what it is, please.

A. It's a report of average daily attendance presented as an official part of our Board agenda; gives additional information; the number of teachers and the number of pupils.

Q. Now it shows, does it not, the enrollment in each school for 1961?

A. Yes.

Q. It shows, does it not, the enrollment in each school for 1962?

A. Yes.

Q. Will you explain what these initials stand for, "ENR"?

A. Enrollment.

Q. And what does "Ar" stand for?

A. It's the—it's the number of pupils actually on roll at that particular time in that—active roll is the term.

Q. Active roll?

A. Enrollment includes the total number of students that have been enrolled in that school anytime during the school year. Active roll indicates the number that are actually enrolled at the time this report was made.

Q. All right. Now would you explain what this enrollment means here, load regular teachers?

[fol. 182] A. Means the number of pupils for each regular teacher in that particular school.

Q. Now I will show you the first document again and say to you that I have transposed from that document, the second one, the average enrollment for each school for 1962; the enrollment for 1962 and the teacher load as shown on there, and have identified the negro elementary and high schools. You want to look at that and see if that—

The Court: Call that Exhibit 9.

The Witness: I'm not sure that I know what you want me to do with that.

By Mrs. Motley:

Q. Well, all I'm saying, I want you to look at this and say whether these are the negro schools. I have put an "n" next to each one of them and I want you to look at these figures and see if they are substantially correct. That is, I transposed them to this document.

Mr. Edenfield: Your Honor, may I interpose an objection to one part of this line of testimony? We have no objection to these figures. I think we furnished them. But insofar as she discusses the fact that this plan is being described—applied in a discriminatory manner, insofar as elementary schools are concerned, and anything below the eleventh grade, the plan hadn't reached them yet; and I don't think [fol. 183] they would be pertinent or relevant. Now insofar as she seeks a broadside attack on the whole plan itself, that may be relevant, if she's allowed legally to make that attack. But I would like to make that distinction.

The Court: Well, the last paper is a conclusion that Mrs. Motley got up from the other two exhibits, Plaintiffs' 7 and 8. In the interest of time, you might would give Dr. Letson more time later on—

Mrs. Motley: Yes.

The Court: —to study that. You have merely taken other papers and transposed them and put them in a different form, have you not?

Mrs. Motley: Well, I have used one of the papers which he gave me, Your Honor, which shows the capacity of each school, and then I have taken the figures from the second paper which shows the enrollment and put the enrollment

figures next to the capacity, and that's all I have done, and I think—

By the Court:

Q. Well, Dr. Letson, unless you can readily make that comparison, we'll let you do it later on.

A. It seems substantially correct, Your Honor.

The Court: All right.

[fol. 184] Mr. Edenfield: Well, the point I was making—

The Court: Yes, I understood your point. I would rather put the evidence in and—and rule on the effect of it later.

Mr. Edenfield: Yes, sir. A lot of these inequities will solve themselves as the plan proceeds.

The Court: I understand.

The Witness: I would like to make a further comment. I'm not certain I can look at a list of all the schools in Atlanta without some further investigation, indicating which ones are attended entirely by negro students and which ones are attended entirely by white students.

By Mrs. Motley:

Q. But you think this indication is substantially correct?

A. Substantially correct.

Clerk: Plaintiffs' Exhibits 7 and 8 are marked "admitted."

By Mrs. Motley:

Q. I would like to show you this application for teaching position, Atlanta Public Schools, and ask you if—if you are familiar with that document.

A. Yes.

Q. Is this the application filled out by persons seeking teaching positions in the school system?

A. I think that's correct; yes.

[fol. 185] Mrs. Motley: We would like to offer this, Your Honor.

The Court: It's Plaintiffs' Exhibit 10?

Clerk: Yes, sir.

Mrs. Motley: I would like—

The Court: That's admitted.

By Mrs. Motley:

Q. I would like to show you this document and ask you to explain what that is.

A. It's an application prepared by the State Department of Education, an application for certification.

Q. Of teachers?

A. Of teachers.

Mrs. Motley: I would like to offer this, Your Honor.

The Court: It's admitted.

Mr. Edenfield: I would like to see that. I can't understand the purpose of it.

Mrs. Motley: The purpose of it is to show that the race of the teacher is requested in applying for teachers.

The Court: Yes.

Mr. Edenfield: By the State of Georgia?

Mrs. Motley: And by the Board of Education, City of Atlanta.

The Court: All right.

[fol. 186] Clerk: Mrs. Motley, I do not have Number 9.

Mrs. Motley: Number 9, what would that be?

Clerk: That's the summary sheet you referred to.

Mrs. Motley: No, I didn't have a separate sheet. I had only two. I transposed figures. There were not three pages. There were two.

Mr. Latimer: Number 3?

Clerk: Plaintiffs' Exhibit 3 is tabulation of number of schools and pupils.

By Mrs. Motley:

Q. Dr. Letson, I'd like to ask you this. The applicants who were denied admission in 1961 and who sought to exhaust the administrative remedy, as well as those who did not seek to exhaust the administrative remedy, do you know whether any of those students have been granted their applications for transfer for 1962?

A. Yes, I think one, possibly has. I'm not positive.

Q. Do you know how many administrative appeals are presently pending?

A. Thirty-three, as I recall.

Q. Do you know how many persons denied admission in 1961 took appeals?

A. I think I'm correct that it was thirty-three.

Mr. Moore: Thirty-eight.

The Witness: Thirty-eight. I beg your pardon. Thirty-eight is correct.

[fol. 187] Mr. Edenfield: Your Honor, for the record, I would like to point out that insofar as those applications are concerned, I think Mrs. Motley would have to come with one of them as a complainant in order to raise this issue. I don't think if their constitutional rights or any other rights have been interfered with, I think they'll have to make the complaint in character with their application.

The Court: Well, I'll let all this evidence in. I'll study over the effect of it—

Mr. Edenfield: Yes, sir.

The Court: —later on.

Mr. Edenfield: All right.

By Mrs. Motley:

Q. Now Dr. Letson, in addition to the Melkll student—

Mrs. Motley: I believe that's the name, is that correct, Mr. Edenfield, the white student.

Mr. Edenfield: Melkild.

By Mrs. Motley:

Q. In addition to that white student who applied for a transfer from Northside, I believe it was, because negroes were being admitted, do you recall that case?

A. Yes.

Q. All right. Are there any other white students to whom you have applied these criteria of the plan?

[fol. 188] A. No.

Q. Now in order to clarify the record, I would like you to explain briefly what procedure you used with respect to applications for transfer in 1962.

A. We accepted the applications; reviewed the records of the students that applied for transfer; evaluated it—evaluated them on the basis of their proximity to school

and the academic ability as shown by the record and test scores that were a part of each pupil's record; we called a portion of those that applied to meet with an interviewing committee, and the interviewing committee prepared a report to me in terms of their recommendations; and I in turn acted upon that recommendation.

Q. Now we have in our proposed findings of fact, in May, 1962, approximately 266 negro students sought transfer to white schools. Is that substantially correct?

A. Substantially so. I think the number is a little larger than that.

Q. How much larger would you say?

A. Around 300.

Q. And how many of those negroes have been granted transfers to white schools?

A. Forty-four.

Q. Have you had any requests from whites in 1962 to transfer to other white schools?

A. During '62?

[fol. 189] Q. Yes, white students to other white schools.

A. Informally, yes.

Q. How many would you say, approximately?

A. I have no idea. I couldn't—I couldn't even guess how many, but I would—50; 100.

Q. Fifty or a hundred whites have sought transfer to other white schools?

A. Is that sometime during the twelve months period?

Q. Yes, that's what I'm getting at.

A. I would say the number for negro students other than in the plan itself has exceeded that number.

Q. I didn't understand that.

A. The number of negro students transferred or requesting transfer from one high school to another other than during the period May 1 to May 15 in my judgment has exceeded the number of white students that have made the same request.

Q. I see. You are saying that there were more negroes seeking transfer from negro high schools to other negro high schools than there were whites seeking transfer from white schools to other white schools, is that right?

A. It would be my judgment; yes.

Q. Now in 1962, these 50 or 100 whites who sought transfer to other white high schools, you didn't apply any criteria of the plan to them, did you?

[fol. 190] A. Not formally.

Q. Well, what did you do?

A. We evaluated the reason that they were requesting a transfer and the educational justification therefor.

Q. What else did you do?

A. Determined the capacity of the school that they were attending—that they were requesting to transfer to.

Q. Anything else?

A. That's substantially it.

Q. Now what did you do in the case of the negroes who sought to transfer to other negro schools?

A. The same.

By the Court:

Q. Dr. Letson, it isn't real clear to me what you say, whether you apply the same tests for transfer to whites and colored. Now you have enumerated all the tests given to colored for transfer and they are clearly enumerated in the plan which this Court has approved. You say as to whites transferring you did not apply that formally, but you also said that in regard to transfer of whites, you did consider the—their educational ability, the capacity of the school and maybe other factors. Would you—would you explain—

A. Yes, Your Honor.

Q. —whether or not these—what you mean by you didn't do it formally and would you explain what factor if any [fol. 191] that you apply to the negro and not to the white in regard to transfer?

A. Your Honor, the pupil placement plan specifies that applications shall be submitted between the dates May 1 and May 15. That application. Is the—is the formal one that gives an opportunity to any pupil who wishes to request a formal transfer with the right of appeal to the Board of Education and beyond. He would utilize those dates as specified in the pupil placement plan. There are other assignments of both white and negro students for

educational reasons and for reasons that are for the best interest of the pupils and the school system that come up at various times during the course of a year. And in some occasions it's a matter of a particular educational purpose. Sometimes it's for the convenience of the parents. Sometimes it's for a combination of reasons that attendance at another school would be preferred. Those have been given consideration by the school administrative staff in exactly the same way. Applying exactly the same criteria. The formal criteria contained in the plan was not applied in these requests that developed other than between May 1 and May 15. But from the standpoint of the school system's responsibility to do the best possible educational job, many of the criteria in the plan were applied to both white and negro students.

[fol. 192] Q. Now as to these intermediate and informal transfers, did you or did you not apply the same criteria to white and colored?

A. We did apply the same criteria to white and colored.

Q. And those criteria, could you name those criteria?

A. The reason that the student gave for requesting a transfer. His educational ability and background in terms of test records that were a part of his permanent record, and educational judgment as to whether the request, for those reasons, would be educationally justified. We also took into consideration the capacity of the school, whether or not it was overloaded and overcrowded. Whether or not for that reason the request should or should not be granted.

Q. I assume that the reason you do that is that that student who was being transferred had not seen fit to make this application back in May?

A. Yes, sir. Many, many reasons for desiring a transfer develop at times other than May 1 and May 15.

The Court: All right.

By Mrs. Motley:

Q. Dr. Letson, I would like to show you this copy of the plan and call to your attention paragraph numbered 1 which contains the criteria to be used in the assignment, transfer or continuance of pupils among and within the schools or

within the classrooms and other facilities thereof and ask [fol. 193] you to list the criteria which you applied to students seeking assignment, transfer or continuances indicated during 1961 and 1962.

A. Available room. Availability of transportation. Effect of admission of new pupils upon established or proposed academic programs. The suitability of established curricula for particular pupils. The adequacy of the pupil's academic preparation for admission to the school. The scholastic aptitude and relative intelligence. Effect of the admission of the pupils upon the academic progress of other pupils. The effect of admission upon prevailing academic standards. Personal standards of the pupil.

Q. The what?

A. Personal standards of the pupil, in terms of overall evaluation of personality in an interview. Of course, the request or consent of the parents or guardians on the basis that the application itself bore that request.

Q. Now these criteria were applied to the applicants who applied between May 1 and May 15, 1961, and May 1 and May 15, 1962, is that correct?

A. Yes.

By the Court:

Q. I notice, Dr., that you referred to transportation but you didn't refer to residence or area where they lived. Was that considered?

[fol. 194] A. That is not a specific part of the plan, Your Honor.

Q. No?

A. We did very definitely take into consideration the proximity of the applicant to the school that he was requesting to attend and the school that he was then attending.

The Court: I see.

By Mrs. Motley:

Q. Now you didn't apply those criteria which you have just enumerated to the whites seeking transfer to white schools at times other than May 1 to May 15, did you?

A. We applied many of the criteria, not formally, but we applied many of the same criteria to both white and negro students requesting transfers other than May 1 to May 15.

Q. All right. Now did you apply any of those criteria to new students entering the school system for the first time on the high school levels involved in the plan?

A. Yes; some.

Q. Which ones?

A. Proximity to schools; transportation; specifically, I'm sure.

Q. Any others?

A. Generally, I think that's it. I'm sure there were others applied in specific cases, but I do know those incidents.

[fol. 195] Q. Now new students who are entering school for the first time in the first grade in September, 1962, how are they assigned to school?

A. There is no particular assignment from the Superintendent's office. In some instances the area superintendent and the principals involved have established a line that determines the division between one school and another. Generally, they go because—the school attended by their friends in that same general area.

Q. Now there are separate lines for the negro and white schools, aren't there?

A. Yes, there are separate lines, certainly in those elementary school districts that have not been reached in this placement plan. But those lines are not rigidly drawn and they are not established by the Board of Education. There are no official lines in this City.

Q. When you say those lines are not rigidly drawn, you don't mean that negroes are free to go to white schools, do you?

A. No.

Q. Now what about the lines on the high school level?

A. They are roughly—they roughly follow the same explanation that I gave for the elementary.

Q. These have separate lines for negro and white high schools?

A. In reality, Mrs. Motley, there are not lines. The [fol. 196] Atlanta School System, as you know, up until September of 1961 was a segregated school system. We are and have been in the process of moving from a segregated

school system to a desegregated school system on the basis of the Court approved pupil placement plan, and we are making no contention, of course, that we have moved all the way from a segregated to a desegregated situation.

Q. But you do have lines on the high school level, is that right?

A. We have certain lines. They are not rigid attendance lines. In fact, pupils—pupils from all over the City attend schools all over the City. It has been necessary in particular cases in—in recent years to—to formalize some of those lines between—between various schools. They have not—there has been no attempt on the part of the school system as yet to draw rigid attendance areas that would be applied irrespective of race to the pupils living there.

Q. Now let me ask you, prior to 1961, students were in the high school—in a high school which was the school to which they wanted to go, didn't they?

A. Yes, this was roughly true. There were no—in some instances when a building was overcrowded, the line was drawn; but that was generally the case.

Q. And then since 1961 you've begun to institute these lines, haven't you?

[fol. 197] A. Not any more formally than was the case previous to 1961 except that it has been necessary in more cases to control attendance in schools because of—because of an overload.

Q. Because of what?

A. Or because of the size of enrollment.

Q. Now how do you control that attendance?

A. By drawing lines from time to time in order to shift pupils from one school to another. This does not apply—is not limited to white schools or to negro schools. We have the same situation in all of them.

Q. Now when a student graduates from elementary school in Atlanta, is there a previously designated high school which that student attends or is assigned to?

A. Usually, the—the pupils that graduate from a particular school go to a particular high school. These assignments were made, I'm certain, in a general way a number of years ago. It doesn't mean that there are not some

schools, however, where part of the students go to one school and part to another from the seventh grade.

Q. Well, you have what is generally referred to in educational circles as a feeder system, don't you, that certain elementary schools feed into certain high schools?

A. Roughly, that's true, with—with exceptions.

[fol. 198] Q. What exceptions do you have here?

A. Well, there are a number of schools where the pupils, some schools where pupils have a choice, for instance. The elementary pupils in some instances go to the nearby school or all in some cases cannot go to the nearby school because of the size of the enrollment.

Q. But what you have in Atlanta is that certain negro elementary schools feed into certain negro high schools; and certain white elementary schools feed into certain white high schools, is that correct?

A. On the basis of the pattern of previous years, that is correct; and we are in the process of changing it by the pupil placement plan.

Q. Now the present plan which you have in your hand, does that make any reference to the assignment of teachers?

A. No.

Q. Now these mass transfers as you call them—I call them the conversions from white to negro schools—which we referred to in our proposed findings of fact, this is done for what reason?

A. Done as a result of changing community patterns. It's done as a result of overloaded nearby schools that make it necessary in order to utilize, fully utilize the capacity of the buildings that we have.

Q. You want to explain what you mean by changing neighborhood patterns?

[fol. 199] A. Communities that have formally been all white have changed to—very rapidly in some instances and in many cases are all negro, or virtually so.

Q. And what do you do with the white students who are attending that school when you convert it to negro use?

A. We make provision for them in a nearby school if there is space.

Q. In a nearby white school?

A. Yes, because of the fact that the pupil placement plan has not reached these grades.

Q. Now the negro high schools in relation to the white high schools are seriously overcrowded, aren't they?

A. Yes.

Q. How about the negro elementary schools?

A. In some instances, they too are overcrowded, and I think that I should explain that it is almost inevitable that this would be the case because our increase in enrollment in the City of Atlanta in recent years has been almost entirely negro children, and it is inevitable that the schools in those areas serving the negro community would be overcrowded.

Q. And it follows, doesn't it, that the negro schools have a higher teacher-pupil ratio than the white schools, doesn't it?

A. They do have a higher pupil-teacher ratio. I would want to point out, however, that on the basis of the formula [fol. 200] for the allocation of teachers approved by the Board of Education there is no difference. As a school becomes overcrowded, however, it is true that as a rule a larger number of students are assigned to a given teacher. I would also want to point out that that is not entirely limited to those schools serving negro pupils. It is more—it is more of a problem in those schools.

Q. But that chart that I made up—I'm sorry, I don't remember the exhibit number; I believe it's 7 or 8—where I transposed the figures, would show, wouldn't it, the overcrowding in each school?

A. Yes.

Q. Now—now would you list for us the extra curricular activities that you say are integrated?

A. Honor banquets, sponsored by the Board of Education; honor societies; clubs; athletic events; and many others that I'm not—I do not—just cannot recall the name.

Q. Are these events that you have just enumerated in the four white high schools that have negro students? Is that what you are talking about?

A. Mrs. Motley, the four—the four schools that now have negro students attending them, we do not refer to as white schools.

Q. Oh, I understand that, but I—

A. We refer to them as schools.

[fol. 201] Q. I'm talking about the extra-curricular activities which you have just enumerated as being integrated.

A. Yes.

Q. Aren't those limited to those four schools?

A. Yes. In general, in terms of my specific reply to that question, yes. But that isn't—that isn't specifically true in terms of athletic events and other occasions in the school system.

Q. All right. Which athletic events are integrated, Dr. Letson?

A. There has been no question about the attendance at any football game that we have had during the past year.

Q. What else?

A. There has been no question about the attendance of P. T. A. meetings in these four schools by—by the parents of the transfer students or friends. There has been no question about it.

Q. So you are still limiting this to the four high schools that are integrated?

A. Yes, because I thought that was the—that was the purpose for your question.

Q. When you refer to the football games, you are referring to the football games at those schools, is that right?

A. No.

Q. Well, what football games were you referring to?

A. Any football games played in the City of Atlanta by [fol. 202] high schools.

Q. Now what is this honor society or honor banquet that you refer to?

A. The Board of Education authorizes a certain amount of money to provide for each school an opportunity to give a banquet in honor of those students who have made outstanding scholastic records.

Q. Where was this banqueting held this year?

A. It was held in all of the schools; in all of the high schools.

Q. Well, each high school has its own banquet—

A. Yes.

Q. —is that what you are saying?

A. Yes.

Q. And those that were integrated were in the four high schools in which negroes have been admitted, is that right?

A. Yes; with the explanation that come September there will be seven additional high schools added to that list.

Q. Do you know anything about a—H. O. Smith Excellence in Scholarship awards which were presented by the Kiwanis Club in May of this year?

A. Those awards were presented to—at the graduation programs for all of our high schools.

Q. You don't know anything about this event, the Kiwanis [fol. 203] Club, where H. O. Smith Excellence in Scholarship awards were made to twenty-two students?

A. No, I do not. They were not a school affair. If—there are many service clubs that invite certain students to come down to them. I do not happen to be familiar with that one. The awards, however, are presented at our graduation programs.

Mrs. Motley: Excuse me, Your Honor. I think we are about to conclude. I believe that's all for this witness, Your Honor.

Mr. Edenfield: May I ask just one or two questions, if the Court please? I will be very brief.

The Court: Yes, sir.

Cross examination.

By Mr. Edenfield:

Q. Dr. Letson, have you primarily been responsible for the—giving direction to the implementation of this plan and the application of it?

A. Yes, sir.

Q. Have you administered it in good faith to the best of your ability?

A. To the best of my ability.

Q. Have you given any consideration or concern to the question of race in administering it?

A. No, sir.

[fol. 204] Q. Was that answer, was your consideration of it affected in any way by the fact that on this application for transfer the race was requested?

A. There's been no particular attention paid to it. It has been a matter of common knowledge, of course, that all except one of the formal transfer requests have been negro students.

Q. Did you cause that form to be printed or was it here when you came to Atlanta?

A. It was printed before I came to Atlanta and started in my present position.

Q. This State form here, are they furnished by the State or do you cause those to be printed?

A. We have nothing to do with the State forms. They are printed by the State Department of Education.

Q. Now speaking of informal transfers, and I use the word informal; I believe that's what you used, other than those—

A. Yes.

Q. —between May 1 and May 15, I believe you said there would be something like 50 or 100 or some such as that, is that right?

A. That was a very rough guess. Yes.

Q. Now is that in all the school system or just high schools or what?

A. High schools.

[fol. 205] Q. Just high schools? Was the answer all high schools?

A. Yes, and as I recall the question, it related to—

Q. Would some of those from time to time be brought about by the fact that somebody would move from one side of town to the other? Was that a specific cause of them?

A. Yes. Sometimes the change of jobs involved a question of convenience and transportation. Sometimes, a decision to take a vocational course or some other course would be involved in the request.

Q. Something was said about the area superintendent or sometimes the principals between two schools—

A. Yes.

Q. —might informally agree between themselves about a line. Did the Board have anything to do with fixing that?

A. The Board of Education does not establish the lines.

Q. Do the principals in an effort, if within—unless they are—an overcrowding situation develops, do they have—

A. Yes.

Q. —authority to change it on their own?

A. Yes.

Q. Mrs. Motley asked—

A. With the approval of the area superintendent.

Q. With the approval of the area superintendent? Now give us the names of some schools—strike that and let me [fol. 206] start over again. Did I understand you to say that sometimes a particular school will become so overcrowded until you have to—are forced to draw attendance lines, is that right?

A. Yes.

Q. For that particular school only?

A. Right.

Q. Is that peculiarly a negro situation or is it both negro and white?

A. It applies to both.

Q. And you say it is more accentuated because of the explosion of the negro population?

A. Right.

Q. But it does happen in both races?

A. Definitely.

Q. Mrs. Motley was asking you about the—where first year students would go, and of course, the plan has not reached them yet, the plan—

A. That's correct.

Q. Now she made the statement, and I assume it was in connection with that, that negroes are not free to go to white schools. That is true except—

A. Except where the plan applies.

Q. Yes, sir.

Mr. Edenfield: Pardon me just a minute, Your Honor.

[fol. 207] By Mr. Edenfield:

Q. Did I understand from your testimony and from your affidavit that no special tests were given applicants for transfer in '62?

A. That's correct.

Q. In other words, they were given exactly the same tests given to every other student in the room both from which they came and to which they sought to go?

A. Correct.

Q. Now is, in the directories and minutes and documents handled by the Board of Education, do you now make any reference whatsoever to race.

A. We do not. There has been an action by the Atlanta Board of Education directing that it not be done.

Q. Is this the directory to which you make reference?

A. That's the current directory; yes, sir.

Q. '61-62?

A. '61-62.

Mr. Edenfield: I don't know it's appropriate to introduce this at this time, Your Honor.

The Court: I don't think it's necessary to put it in.

Mr. Edenfield: All right, sir.

The Court: He just said what it wouldn't show, and unless there is—

Mr. Edenfield: All right, sir.

[fol. 208] By Mr. Edenfield:

Q. Dr. Letson, I show you what purports to be some excerpts from minutes, of the minutes—various minutes of the Atlanta Board of Education with reference to making any present or future reference to race in the minutes or actions or publications of the Atlanta Board of Education. Did you cause, or are those correct excerpts from those minutes to your knowledge?

A. Yes, sir; they are.

Q. Did you cause those excerpts to be abstracted from the minutes?

A. I did.

Q. Dr. Letson, what are the new schools which under the plan will be desegregated in September, the names of them, each school?

A. Seven high schools. O'Keefe; West Fulton; Fulton; Smith; Roosevelt—

Q. How about Bass?

A. And Bass.

Q. Did you mention Sylvan?

A. No.

Q. Is Sylvan one of them?

A. Is that seven? That's six; Sylvan is the other.

Q. Did I understand you to say that these massive transfers to which you referred, was any reference made in connection with that to race?

[fol. 209] A. No, sir.

Q. What was the reason for those transfers?

A. To relieve overcrowded schools in the neighborhood.

Mr. Edenfield: That's all, Your Honor.

By the Court:

Q. Dr., let me ask you this question. You have had long experience in dealing with schools and cities and so forth. Is it or is it not a usual thing when a child is in a certain school, lives in a certain place, do they frequently, when one school year ends and another starts, do they go around to different schools or is it more customary, barring some reason for it, for them to stay in the same school?

A. It is generally customary, Your Honor, for—for school zones or school areas to be rather clearly defined, and the students continue to attend school in those general areas and in those neighborhoods in which they live.

Q. The reason I asked, there is some question raised in this case, I don't know whether I'm right clear on the contention or not, that these tests which are given apply only to persons who are transferring. And I was wondering what would be the necessity of a test given to a child who was in the school last year and is going back to the school next year, as to whether or not they were in the proper [fol. 210] school or whether they should be put in some other school. The plan is based entirely on the question of changing.

A. Your Honor, that was our assumption, because before the implementation of this plan, previous to last May—previous to May 1 in 1961, there was a designation for all pupils within the school system, and specifically in the grades covered by the plan, that they were assigned, reas-

signed to the school that they had formerly attended. This was—this, we felt, was necessary in proceeding in good faith under the plan, because if a pupil is to be given an opportunity to initiate a transfer, he must have a base from which to transfer.

Q. Well I'm trying to get this clear, plan or no plan, segregation, integration or anything like that, before this question ever arose, was or was it not customary at the end of each year for students to select the school to which they wished to go, and to re-register, do they not re-register each year, or do they not—or their parents give you a notice each year that they intend to go back to that school?

A. It is assumed, and it is assumed they will come back to that school unless there is an exception granted upon a request.

The Court: I see. That's what I wanted to know.
Any further questions?
Mrs. Motley: Yes.

[fol. 211] Redirect examination.

By Mrs. Motley:

Q. Dr. Letson, on this excerpt from the minutes of July 9, 1962, regarding the James L. Key School, it says this: "Mrs. Mitchell moved adoption of the recommendation of the superintendent that the building formerly housing the Key School be renamed." What's the purpose of renaming that school?

A. Because the Key School will be maintained—at Hoke Smith High School.

Q. It's going to be renamed when you admit negroes to that school, isn't it?

A. It will be renamed when it serves to relieve the overcrowded situation in the nearby schools.

Q. And the nearby schools which—which will be admitted here are negroes, aren't they?

A. Yes.

Q. That has always been the policy, hasn't it, Dr. Letson, when schools are converted from white to negro use, this is the case?

A. No, not necessarily. And this is done only because the Key School will maintain its identity.

Q. All right, now. Which schools did not change the name when negroes were admitted?

A. Mayson.

Q. Pardon?

[fol. 212] A. Mayson; Whitefoord; Margaret Fain—the only ones since I have been directly concerned with Atlanta, there has been no name change.

Q. But that was the policy, wasn't it, before?

A. If so, it's certainly not to my knowledge.

Mrs. Motley: That's all.

The Court: Take a five minute recess.

(Whereupon court recessed at 11:07 A.M.)

Recess

(Whereupon court reconvened at 11:12 A.M.)

The Court: You may proceed.

Mrs. Motley: Your Honor, we have one more witness, testimony from which will be fairly brief.

The Court: Yes.

Mrs. Motley: Mrs. Harris, would you please take the stand?

Mrs. Lottie Harris, having first being duly sworn, and called as a witness in behalf of the plaintiffs, testified as follows:

Direct examination.

By Mrs. Motley:

Q. Mrs. Harris, will you state your full name, please?

A. I am Mrs. Lottie Harris.

Q. Are you a resident of the City of Atlanta?

[fol. 213] A. I am.

Q. Where do you live?

A. I live at 1478 Mosley Drive, S.W.; Atlanta.

Q. Do you have any children in the public school system of Atlanta?

A. Yes. I have one daughter in Turner High School.

Q. How long has your daughter been in Turner High School?

A. She's been there three years. This will be the fourth year coming up.

Q. Have you ever appeared before the Board of Education of the City of Atlanta respecting the Turner High School?

A. Yes, I have.

Q. When was that?

A. September the 11th, 1961.

Q. What was your purpose there?

A. The purpose was to ask some relief at Turner for the overcrowded conditions there.

Q. Did you make a study of the conditions at Turner before going to the Board?

A. Yes, I did.

Q. What did you find the conditions to be?

A. We found that the school, I think, was built so I was told, to house a thousand children. At that time there were over two thousand in the school building. It had practically doubled its capacity.

Q. Did you have any written materials to present to the [fol. 214] Board regarding that condition at that time?

A. Yes. We carried to them a statement of facts which we found to exist.

Q. Do you have a copy of it?

A. Yes, I do.

Clerk: Would you like that marked?

Mrs. Motley: Yes, I would.

Clerk: Plaintiffs' Exhibit for identification 12.

By Mrs. Motley:

Q. Now that paper which you have in your hand which has been marked Plaintiffs' Exhibit 12 for identification, does that statement set forth substantially your complaint to the Board on that evening?

A. Yes.

Q. And has the Board taken any action to relieve the overcrowding at Turner?

A. Not that I can visibly see.

Q. Have they ever replied to you on that in writing?

A. Yes—no, not in writing. We have not received anything in writing.

OFFER IN EVIDENCE

Mrs. Motley: I believe that's all. We would like to offer that in evidence, your Honor.

Mr. Edenfield: Your Honor, I don't know that the question of overcrowding is one that's before the Court on this occasion. The testimony so far, and frankly admitting [fol. 215] that that school is overcrowded, it's not a racial problem. It's an area problem. It applies in all—in many schools.

The Court: I don't—

Mr. Edenfield: This statement, this document is a statement purported to be prepared by one Lionel H. Newsome, representative of the volunteer parents of children at Turner High School. It starts off about a gigantic struggle between the United States and Russia, Cuba and Communism, and I'd say it's rather irrelevant to this proceeding and self-serving in character. For whatever it's worth, I admit the school is overcrowded.

The Court: I think the statement not being under oath is of course hearsay. As far as the probative value of it is concerned, the only thing it would show is that she had contended or protested that it was overcrowded. I was trying to see if there's anything in the proposed findings of fact here in which plaintiffs were making any contention in this case about overcrowding. I don't know whether it's in here or not.

Mrs. Motley: Yes, we do, Your Honor. We set forth the fact that the negro schools are overcrowded, resulting in higher teacher-pupil ratios, and the purpose of this is to show that the negro parents have undertaken to protest [fol. 216] to the Board regarding those conditions; and we maintain that those conditions result from segregation, because the chart which we've offered in evidence shows that the white high schools in many instances are under enrolled and that these children could be relocated in those schools very easily and wouldn't be overcrowded.

The Court: Merely to say that a person heard that a certain school was built to accommodate a thousand is not very much proof that two thousand in there would necessarily overcrowd it. It's rather—rather tenuous proof there that the—that the school was actually overcrowded.

Mrs. Motley: Well, the chart which we've introduced has those figures and they are substantially as she has indicated. The number of rooms in Turner, the capacity of Turner and the number of people enrolled in Turner certainly shows the overcrowded condition.

The Court: Well, that's better proof. Was that put in by the respondents—I mean—

Mrs. Motley: We put that in, yes. That's one of our exhibits. I just don't know the number.

The Court: Was that from the records of the School Board?

Mrs. Motley: That's right.

[fol. 217] The Court: I see.

Mrs. Motley: They furnished that to us.

The Court: Yes.

Mrs. Motley: And the purpose of this is to show that the negro parents have complained to the Board regarding these conditions.

The Court: Well, I'm going to admit the document at least for the purpose of showing that she made the complaint, but I'm ruling that the statements in there are not proof of the facts which they recite.

Mrs. Motley: Well, as I say, I think we have other proof of the facts recited.

The Court: All right.

Mrs. Motley: That's all, Mrs. Harris.

Mr. Edenfield: Just one second, Mrs. Harris.

The Witness: Yes.

Cross examination.

By Mr. Edenfield:

Q. You heard the testimony of Dr. Letson, did you not?
A. Yes.
Q. Given in this case today?
A. Yes.

Q. Did you hear him testify that overcrowding of schools was not peculiarly a negro problem, that there are other [fol. 218] areas in which there was overcrowding?

A. Yes, I heard his statement.

Q. Do you know of any fact to refute what he says or to suggest that what he says is not correct?

A. I could not say about the white schools, because I don't know; only from their records and what they have published; but I do know in the negro schools that they are.

Q. Did you hear his explanation, his admission that that is correct and his explanation that the increase in population, school population in Atlanta over recent years, has been predominantly an increase in negro population?

A. Yes, I heard that.

Q. Do you have any facts that would disprove that statement by Dr. Letson?

A. No.

Q. You do know, of course, that there is presently proposed a bond issue for the purpose of building new schools to relieve overcrowded conditions? You know that, do you not?

A. Yes.

Mr. Edenfield: That's all.

The Court: Just one second.

By the Court:

Q. Do you, Mrs. Harris, in spite of these conditions, you [fol. 219] didn't ask for a transfer of your child to another school?

A. Judge, Your Honor, I did not, because I did not feel that—you see, I'm near, right at Turner, right near Turner.

Q. That's right.

A. And I did not feel that my child could stand the pressure.

Q. You live closer to this Turner?

A. Yes, Your Honor; near.

Q. And her friends are in there with her?

A. Yes, they are.

The Court: All right. You may come down.

Mrs. Motley: That's all for the plaintiffs, Your Honor.

The Court: All right, You may proceed for the defense.

Mr. Edenfield: Just one second, Your Honor. Your Honor, would you give us just one second? I believe it might shorten the matter.

The Court: Yes, sir.

OFFER IN EVIDENCE

Mr. Edenfield: Your Honor, I would like to tender in evidence the excerpts from the minutes which Dr. Letson identified.

The Court: Mrs. Motley, is there any objection to that copy?

[fol. 220] Mrs. Motley: No, Your Honor.

The Court: They're admitted.

Clerk: Defendant's Exhibit No. 2.

Mr. Edenfield: And to avoid introducing this document, I would like to, if Mrs. Motley can agree, that she simply stipulate that with reference to the race in the directory, has been eliminated.

Mrs. Motley: Yes, we are willing to stipulate that, Your Honor.

The Court: All right.

Mr. Edenfield: May it please the Court, I don't believe with the statement I made previously that we have any further evidence. I think Dr. Letson has stated our position very well.

The Court: Yes. All right. The Plaintiff may proceed to argue the case.

Mrs. Motley: Your Honor, we have in addition to submitting proposed findings of fact submitted proposed conclusions of law.

The Court: Yes; they are very complete.

Mrs. Motley: I would like to say that the Fifth Circuit rendered an opinion in the case of Augustus against Public Board of Instruction of Escambia County one day last week. I had intended to have copies of that opinion today, [fol. 221] but I have been away from New York and I haven't had an opportunity to do so. And we would like to furnish the Court with a copy of that after this hearing

today because I think it has some bearing on this case. And I would like to briefly point out what that case is about. In that case, the negro plaintiffs asked for the reassignment of teachers on a non-racial basis. The school authorities moved to strike from the complaint those allegations regarding the assignment of teachers, principals and other professional school personnel on the basis of race, and they moved to strike from the complaint the prayer, that is, those portions of the prayer which sought reassignment of personnel on a non-racial basis. The Court of Appeals for the Fifth Circuit has ruled that the striking of those allegations from the complaint were improper; that a question like this should not have been decided on motion to strike. The Court ruled that the Judge, however, in his discretion might delay the question of reassignment of teachers until there had been reassignment of pupils or until the pupils had been substantially reassigned. In other words, the Court recognized, as the appellant had contended, that the Brown decision carries with it a [fol. 222] mandate not only to reassign pupils on a non-racial basis, but a mandate to reassign teachers, and to do away with negro and white schools. The Sixth Circuit in its opinion in the Northcross case which we've cited and which is now recorded is of the same view. There, was a complaint which alleged the teachers were assigned on the basis of race. They set forth that contention or rather allegation from the complaint and returned the case to the District Court, in that case, with directions to grant the relief as prayed for in the complaint, or in the alternative, requiring the school authorities to come forward with a plan as prayed. And in that complaint, the plaintiffs prayed for the reassignment of teachers on a non-racial basis. So I don't think that there's any question that the school authorities here have a duty to reassign teachers. Now—

The Court: Mrs. Motley, would you like for me to hold up my decision until I read that Fifth Circuit case or do you—what would be your wishes in that regard, the last case?

Mrs. Motley: I think we could get it to you in about a couple of days. I don't know whether Your Honor had

planned to render a decision today, but I don't think that—
[fol. 223] The Court: What is the style of that case? I may have it in my office.

Mrs. Motley: Yes. It's Augustus against The Board of Public Instruction of Escambia County, Florida. That's Pensacola, the major city.

Mr. Edenfield: Your Honor, if I might interrupt, I would say this. I stated in my opening statement or in answer that we have not made any attempt to reassign teachers. That—I said then that we intended to do that last, after pupils had been reassigned. I didn't prove that, but I state in my place that that is the intention of the Board. I understand from Mrs. Motley that that's what the Fifth Circuit said was permissible.

The Court: I thought that was what she said.

Mr. Edenfield: If that be true, then I agree with her statement of it. I don't know any reason to wait for it if the language—as far as we are concerned—

The Court: I may say, Mrs. Motley, some years ago there was litigation here brought by the negro school teachers, a case of Davis against Cook.

Mrs. Motley: Yes, I recall it.

The Court: Davis was the plaintiff, and the school authorities here recognized that there could be no discrimination in regard to teachers, and they changed the entire [fol. 224] salary scale. The case went through the Court of Appeals here, and I didn't know until this matter here was at a hearing that this was a class action in behalf of the teachers at all. This is rather a surprise to me, this matter of the teachers being injected into the case; but I will carefully read that opinion—or any brief—that you might wish to cite on it.

Mrs. Motley: Yes, you see, the school authorities in Escambia County contended exactly that, but—the pupils had no standing to sue for the teachers, but as Judge Rives pointed out, schools are there primarily for pupils and teachers are a part of the school, and the pupil is entitled to attend school in a non-segregated school system and a segregated school is one in which not only are all the pupils negro, but all the teachers are negro, and they've admitted

here that the negro teachers are assigned to negro schools. So what makes a negro school is the fact that the children are all negro, and in front of every class is a negro teacher.

The Court: If you file any supplemental brief, which you are free to do, I wish you would point out anything that's in the record by way of the original complaint or any orders [fol. 225] or anything else in this case showing that up until now there has been any issue in here in regard to the school teachers.

Mrs. Motley: Yes, sir. In our complaint, we alleged the teachers were assigned on the basis of race, and asked for an injunction enjoining the operation of the system on the basis of race.

The Court: You mean your original complaint?

Mrs. Motley: Yes, sir.

The Court: I see. All right.

Mrs. Motley: Now, the—sorry; may I go on?

The Court: Well, did I understand you to say that the Fifth Circuit had ruled that it is proper to withhold action on the teachers until the question of the pupils was resolved?

Mrs. Motley: Yes, sir.

The Court: Well, are you asking for any order at this time in regard to teachers?

Mrs. Motley: Yes. We have submitted a proposed alternate plan which proposes that children in the high school, that's grades 8 through 12 I believe, be reassigned in the high schools next year on single zone lines, and that the teachers also in those particular grades be reassigned; and then in the following year, which would be 1964, we ask for all pupils and all personnel in grades 4, 5, 6 and 7 to [fol. 226] be desegregated in accordance with the high school grades on the basis of single zones, and that the teachers be reassigned; and then in September, 1965, we ask for grades 1, 2 and 3, all pupils and all personnel.

The Court: You are virtually submitting a new plan here.

Mrs. Motley: That's right.

The Court: I see. All right. Now is there anything further from either side? If not, I—

Mrs. Motley: I would like to make one or two more points—

The Court: Yes.

Mrs. Motley: —if I may. Of course, I've cited a number of cases in our proposed conclusions of law and I think from these cases, particularly in the Fifth Circuit cases, it's clear that the plaintiffs in these cases have a right to come back at anytime and file a motion for further relief for the purpose of bringing about full compliance with the Brown decision. Now I'd like to call Your Honor's attention particularly to the Dallas case, which is Boson versus Rippy. That's 275 F. 2d and so on. And there's a 285 F. 2d which I hope we've cited. There are so many citations—yes, we do, on page 16, we cite the second one. In that case, [fol. 227] that Dallas case, the Fifth Circuit expressly ruled it wasn't approving grade-a-year plan but it would permit that kind of plan to go ahead in Dallas so that there could be a start toward desegregation. In the Augustus case which was decided the other day, the school board adopted the Florida Pupil Assignment Laws as the basis for assignment of pupils to school, and it required pupils as in this case to apply for admission to particular schools and then they would apply to those applications the criteria that the Florida Pupil Assignment Law set forth. Now the Fifth Circuit ruled that was insufficient. They had to have a plan for initial students entering school for the first time. They would have to have a plan for students coming into the system for the first time, and they said that with respect to those students entering school for the first time in the first grade in September that they should be assigned on the basis of school zones. And if it's too late for September, they said the next year, the first two grades should be assigned on the basis of school zones; and this was supplementing the start which the Board has made for September, 1962, which start consists of letting negroes apply for [fol. 228] admission to white schools and applying the criteria to those pupils. And then they said that each year thereafter, there should be school zone lines drawn for at least, for a minimum of one grade a year, and of course, the plaintiffs could come back at anytime to get that

speeded up or the Board on its own could do so. Moreover, the plaintiffs could submit a plan of their own to help the District Court with this, so that the plaintiffs here have submitted a proposed plan as suggested there as to what could be done to speed this up. And I think the evidence here clearly shows that the only people subjected to these criteria of the plan have been negroes. There has been one white person subjected to the criteria, but that was a white person who was complaining about negroes being admitted to the school which the student was attending, and to her they applied the criteria of the plan. But for that situation, the criteria would not have been applied to anyone but negroes. Now the Fifth Circuit has already ruled in the Manning case if you use a pupil assignment law or criteria as the basis for assigning students, those criteria have to be applied to everybody, and they can't be applied just to negroes seeking transfers to white schools, and that's why [fol. 229] we contend here that the plan as to grades 11 and 12—and 10—should have been applied to all students, as the Court had ruled, and not just to negroes seeking assignment to white schools because that's discrimination against negroes on its face. That's subjecting negroes to a test different from a test applied to whites, and that's clearly a denial of equal protection. So what the Board has done here is in clear violation of law. You can't apply a different standard to negroes than the standard applied to whites, so that the plan which they are operating under cannot pass the test of equal protection, and it seems to me that therefore they are required to come forward with a new plan, a plan which more clearly conforms to the decisions already rendered by the Fifth Circuit.

The Court: I don't see that you have proven that there's any standard here applied to the negro and not to the white. The—the plan of transfer has operated in regard to colored primarily because they are the only ones that have asked for a transfer. The only transfer asked for by a white girl was this Miss Melkild, I think her name is, and her application was turned down by this Court expressly on the ground that it was based on discriminatory grounds. She didn't show any reason for a transfer except for the fact

[fol. 230] that some negroes had been admitted to a school that she was attending, which was—which was on the basis of discrimination from another way. And her application was turned down. Now I don't know of any—I don't know of any other white application that's ever been filed except that one.

Mrs. Motley: Yes, that's—no white application has been filed during that period because everybody understands that that's the period when negroes apply for admission to white schools, and the whites—

The Court: No, the plan doesn't say that.

Mrs. Motley: No, sir; the plan doesn't say that but everybody understands that, and I don't think the Court can close its eyes to what everybody else understands. I think that the whites have applied at other times for transfers and there are obviously many of such transfers in a school system of a 100,000. There are people moving back and forth every day. That was one of the reasons for wanting this kind of plan because you have these tremendous population shifts in Atlanta. You have whites applying for transfer every day in the week. And to those whites no test is applied except their reasons for transfer, and they [fol. 231] may look at their scholastic records, but the fact is, as the Fourth Circuit pointed out in the two cases we furnished, I believe we furnished copies of the Fourth Circuit cases in the Marsh case and the Greene case, the Fourth Circuit dealt squarely with this problem. They said, of course, the only people seeking transfers would be negroes from negro schools. That's what the suit is all about, and you can't apply these criteria just to negroes seeking transfers to white schools. And they point out exactly what I'm saying here, that this plan is operated to put a burden on negroes not shared by whites.

The Court: Well, the Greene case to which you refer, written by Judge Sobeloff, on page 8 of the opinion which you furnished to me, has this language: "This Court has on several occasions recognized that residence and aptitude or scholastic achievement criteria may be used by school authorities in determining what schools pupils shall attend, so long as racial or other arbitrary or discriminatory fac-

tors are not considered." Now I call your attention to the fact that under the Atlanta School Plan that any—any colored wishing to transfer may do so. In 1961, a certain number did, and 10 were given a transfer. In '62 a larger [fol. 232] number applied and I think some—some 44 it's said were admitted in seven high schools where they were not admitted before. Now there is not a scintilla of testimony in this case, that any of those who were rejected were rejected on any other basis than the language I just read from Judge Sobeloff of the Fourth Circuit in the Greene case which you cited, and that Court has recognized and every Court has recognized that residence and aptitude or scholastic achievement criteria may be used by the school authorities. Now I think that's very significant. It doesn't make any difference whether it's the white or the colored moving for a transfer. It so happens that the whites do not wish to transfer. If they did, they would have the same criteria here as applied to the negro. But the vital point in here seems to me to be this, that in every case where they have refused to transfer a negro, that particular negro has not come into Court and tried to prove that he or she had the aptitude or scholastic achievement which is required, even in the cases which are cited by you, and that seems to me to be rather significant. I'm going to withhold decision in this matter and let you cite the additional cases which you've—you say have just recently been [fol. 233] decided. I have given very careful thought, I've read the cases cited by you in your original brief for the most part; not all of them. You may close the Court until further order.

(Whereupon Court was closed at 11:46 A.M.)

End of Transcript

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 234]

IN UNITED STATES DISTRICT COURT

ORDER OF COURT—September 14, 1962

The Court held a hearing on plaintiffs' motion for further injunction. At said hearing an attack was made on the proposed Pupil Placement Plan heretofore proposed by the Atlanta Board of Education and approved by this Court. The criticism to this Plan now offered for the first time is that it provides for certain tests to be given to pupils desiring to transfer from one school to another, such transfers now applying to the twelfth, eleventh and tenth grades. Each year hereafter it shall apply to the next lower grade until all Atlanta common schools will be subject to the same.

Specifically, the attack made upon this Plan is to the effect that it requires certain tests to be given to students desiring to transfer to the above three grades but that it does not require the same test to be given to students in the same school who are being promoted to these grades from a lower grade.

It is true that the Fifth Circuit Court of Appeals, writing through Judge Tuttle, made statements in the case of *Manning* vs. *Board of Education of Hillsborough County*, 277 F.2d 370(3) to the effect that tests required of students transferring must also be applied

> "to all students and not only to those wishing transfers" (277 F.2d, 374).

[fol. 235] The above language was made in connection with the judgment of the district court dismissing a complaint, and concerned possible evidence that might be introduced under the complaint and given as a reason why the trial judge erred in dismissing the complaint. Consequently that court did not elaborate on the question.

This Court is therefore setting this case down for further argument so that the following questions may be clarified:

1—As students who have been for several years in a particular school have already passed certain tests year by year

and are qualified to pass other tests for promotion to a higher grade, is it necessary or feasible to give them the same tests that would be required of students transferring from another school?

2—As students who have already attended a certain school for several years are well known to faculty and the students, live within the proper area and are well adjusted to the school may possibly be capable of classification without other tests, is it nevertheless necessary under plaintiffs' contentions for them to receive the same tests as given to students who, from other areas and other schools, desire a transfer?

3—What is the position of the defendants in this case as to one instance shown by the evidence where a Negro pupil allegedly was transferred on account of crowded con- [fol. 236] ditions to a school, although there was a white school nearer to his residence? The Court should determine whether that is a general policy of defendants, whether it is discriminatory, and whether it should be enjoined in the future.

This Court has been withholding entering Judgment on defendants' motion pending the writing of a transcript of the evidence, but believes that considerable time will be conserved by setting the matter for further hearing on the above questions pending the transcription of the previous hearing.

The Clerk is therefore directed to place the above stated case on the non-jury calendar of this Court at the earliest time that is open.

This the 14th day of September, 1962.

Frank A. Hooper, United States District Judge.

[fol. 238]

IN UNITED STATES DISTRICT COURT

Hearing on Motion for Further Relief—October 30, 1962

Atlanta, Georgia

Before: Honorable Frank A. Hooper, Judge.

APPEARANCES:

For Plaintiff: Mrs. Constance Baker Motley, Donald L. Hollowell, E. E. Moore, Jr.

For Defendant: Newell Edenfield, A. C. Latimer.

The Court: Are the plaintiffs ready to proceed in this motion for further relief.

Mrs. Motley: Plaintiffs are ready, Your Honor.

The Court: All right. You may proceed.

Mrs. Motley: May it please the Court, in answer to the questions set forth in Your Honor's order of September the fourteenth, the plaintiffs have already submitted to this Court a proposed findings of fact and conclusions of law; and I think that the cases which we have cited in our conclusions of law answer most of the questions which have been put to us by the Court.

The Court: I don't believe that they have been brought to my attention. Mr. Beers, would you give me that?

The Clerk: Yes, sir.

[fol. 239] The Court: Pardon me just a moment. I would like to glance over that. Has there been any answer filed to those by the defendants?

The Clerk: Yes, sir. Both sides have submitted—

Mr. Edenfield: We have made a response Your Honor and both—orally on the last hearing and also we filed a written response.

The Court: Yes. Well, it would be right helpful to me to know what the issues of fact are for this hearing. May I ask if the defendants, or the plaintiffs have any witnesses they want to use in this hearing.

Mrs. Motley: No, sir. My understanding was that there would be a further argument as to the questions propounded by the Court; not that any further testimony would be required. As Your Honor recalls, we examined the Superintendent of Schools at the last hearing and that we introduced a number of exhibits which were admitted. We submitted these proposed findings of fact and conclusions of law and we also submitted a proposed alternate plan of desegregation. I believe that in connection with our motion for further relief we also filed a memorandum of points and authorities.

The Court: Mrs. Motley, I want to call your attention to the fact of your proposed new plan, in the first place, it didn't come in here until at the end of all this matter and the very last proceeding. Secondly, I call your attention [fol. 240] to the fact that you didn't introduce a bit of evidence to show that the plan was practicable and having originally approved a plan which is in operation and having on the first, at that time having gone very thoroughly into the situation in Atlanta schools, the crowded conditions and this, that and the other, and approved that plan, it would seem to me that in order to change that plan now and speed it up that there should be—should have been some evidence offered to show that this speeding up process was —was feasible. In other words, I do not have any basis on which to go to change the plan and speed it up, certainly without hearing from the defendants as to whether it will work too great a hardship or confusion or chaos in the crowded conditions of the Atlanta schools to accelerate it, without a line of testimony or without an opportunity to defendants to show whether or not that, that could feasibly be done. Now I know in a few cases, the Fifth Circuit Court of Appeals have more or less peremptorily just made their own plan, but those were all cases, as I recall, where there was no cooperation shown in the lower court toward forming a plan, and I would like to have, I would like to have your citation of authorities in those cases to see that I have all of them. But that is my recollection, that that's the only circumstances under which there has been a more or less peremptory order speeding up a plan, was where there was [fol. 241] no effort made by the court below or the defen-

dant in the court below to make a reasonable plan. And that's the reason I didn't put that feature of this case down for a further consideration this morning, because there's no evidence introduced here showing that, that it's feasible to change this plan. This plan was not appealed from. It's been working satisfactorily. In your original motion, you didn't ask to speed it up; I don't believe in your amendment. It was only at a very late date that you more or less casually threw in here that you want to speed it up; no evidence on it; and that's the reason I didn't put it down for any further hearing because frankly, I—I just don't see how I can peremptorily speed the plan up without some evidence to show that, that it would be at all feasible, and I have none whatsoever. But I'm getting off onto something else. Let's come back to the—

Mrs. Motley: Well, does Your Honor want me to reply to that.

The Court: What was that.

Mrs. Motley: Does Your Honor want me to reply.

The Court: Oh, yes.

Mrs. Motley: Well, we think that the burden is on the defendants under the Supreme Court's second decision in the Brown case now, that a start toward desegregation in Atlanta has been made, the burden is on them to show that additional time is needed in the public interest, and they [fol. 242] showed nothing in response to our proposed plan at the last hearing. In the Augustus case, which is the last one, I believe, just before the Bush case, decided by the Fifth Circuit, they said that the plaintiff might suggest plans as well as the defendants to speed up the situation there. And as I understand it, that would be the law of the Fifth Circuit, that the—

The Court: Now give me once again those citations please.

Mrs. Motley: That's the Augustus against The Board of Public Instruction of Escambia County, Florida. In that case—I'm sorry I don't have the citation; I believe it's now reported. It was decided in August of this year by the Fifth Circuit. I believe I furnished the Court with a copy of that opinion.

The Court: I think I have that in my file.

Mrs. Motley: Yes. Now there, they have a plan similar to the plan here, a pupil assignment plan. Their plan, however, was a State Law. The plan here was a School Board plan, but essentially they were the same. They required negro students to apply for transfers. Now the Fifth Circuit pointed out there that that was insufficient. That in addition to committing students to apply for transfers at this time, the school authorities are required to come forward with a single school zone or school district plan beginning with the first grade and going on up through [fol. 243] the school system, at least a grade a year. And if it were too late for September, '62, then they should do two grades in September, '63. And that's because the Brown case requires that the two school systems be reorganized into a single school system, and that is the basis on which we objected to the original plan in this case, as our objections will show. We did not approve the plan. We objected to it, in lengthy objections. The Court approved the plan, and we consider that under the Brown case that plan is no more than a start toward desegregation.

The Court: You also filed a Bill of Exceptions on appeal and dismissed it.

Mrs. Motley: That's right. We did. We don't understand that any of these cases are concluded after a first hearing in them. I think the Fifth Circuit has repeatedly ruled that the Courts must retain jurisdiction of these cases until there has been full and complete compliance with the Brown decision.

The Court: That's true, and I do not mean to say that the original plan has to be just frozen and fixed for all time if circumstances are shown to the Court to change it. But what I am trying to say is this. Where a plan has been approved, where a plan has been in operation several years, and where all that the movant shows is that they want it speeded up, do not show any facts, do not show whether it's feasible to speed it up, you say that by plaintiff coming [fol. 244] in and merely asking to speed it up, that all presumptions are against the defendant and the burden is on the defendant to show that it should not be speeded up as requested. I don't think that's correct as a statement of law.

Mrs. Motley: The plaintiffs don't say that. The Supreme Court says that in the second Brown decision, that these negro students are entitled to their constitutional rights now, and if there is to be any delay, the burden is on the school authorities to show that there must be a delay in the public interest, and what we have here in Atlanta, is forty-four or whatever the number is of forty or fifty thousand negroes admitted to white schools in two years, and we say that's not desegregation, and I believe the Fifth Circuit will agree with us. Then—

The Court: Well,—

Mrs. Motley: —the Brown case never contemplated any such situation.

The Court: You say there's fifty thousand negro students.

Mrs. Motley: Well, I am not certain of the number, Your Honor.

The Court: Well, let's say around that number. Those fifty thousand haven't asked to be changed.

Mrs. Motley: They don't have to ask, Your Honor. That's our second proposition, that negro students do not [fol. 245] have to ask for constitutional rights which the Supreme Court says they are entitled to. And the Fifth Circuit has ruled that at least four times, and the Sixth Circuit ruled that in the Northcross case, another case which we furnished a copy of. They said it specifically when they knocked out the pupil assignment law of Tennessee, that negroes cannot be required to apply now for something the Supreme Court says they are entitled to.

The Court: At the same time, the Fifth Circuit has repeatedly ruled that the, what the Court should do is to prevent discrimination and not to force mixing. And if the negro students do not desire to change, you don't—you do not contend, do you, that the Court should pass an order and force them to transfer.

Mrs. Motley: Yes, because negroes don't have any more right to attend or insist upon segregated schools than white students do. The school system is to be operated without regard to race, and no negro has the right to come in here and say, "I want to go to a negro school," anymore than a white student does.

The Court: Well, the one point here that you and I differ on is this. I say that when a plan has been adopted, there's no appeal or appeal was filed and it was dismissed, and you want to change that plan and speed it up, which I say again seems to be sort of a last minute after-thought in this particular motion, and do not introduce any evi- [fol. 246] dence, you are saying that you could come into Court at any time and say, "Speed it up," and it would always throw the burden of proof on the defendants to show that they cannot speed it up. Now, that's—that's a rather novel proposition to me that all you have to do is come in and say, "I want it speeded up."

Mrs. Motley: Yes. I think that's the law, Your Honor.

The Court: Now I—

Mrs. Motley: Your Honor may disagree with me, but I think that's the law.

The Court: I'll read this Augustus case and see if it says that. But I recall reading the case but I didn't get that out of the case. I'll say this, that under the particular facts of the cases, the Fifth Circuit in some instances has done that, but as I say, it was under circumstances quite different from those that, that exist here in this case. Well, let's take some other phase of the matter, then. Now I find that I have studied your findings of fact dated July 20, 1962. Is that the one you have reference to.

Mrs. Motley: Yes, sir.

The Court: And your conclusions of law there cite a number of cases. They do not—you do not cite, though, in your conclusions of law the case of Augustus against the Board of Education.

[fol. 247] Mrs. Motley: No, sir. That came out after I prepared that, and I furnished a copy. Also, I think the Northcross case—no, there were two cases from the Fourth Circuit, Greene and Marsh, and I believe I furnished copies to the Court.

The Court: Now this list of witnesses attached here, are those witnesses—

Mrs. Motley: We've already had the hearing on that, Your Honor; last time.

The Court: I see. All right. Well, suppose you proceed

with your argument and we can refer to these findings of fact as—as necessary.

Mrs. Motley: Well, in reply to the Court's specific questions here, we cite the Manning case which we have already cited and which the order itself cites to the effect that the school authorities may use any standard of pupil assignment which they choose, but whatever standard is chosen must be applied to all students within the school system and not just the students seeking transfer. Now the evidence in this case shows that the plan has been applied only to negroes seeking transfers to white schools, who apply between May 1 and May 15, 1962. Now there was one white student to whom the plan was applied who protested against negroes being admitted to that school, but that is obviously a circumstance which would not ordinarily occur, and her application was denied, which showed that the plan oper-
[fol. 248] ates only against negro students which—

The Court: Let me ask you a question about the Melkild case. In that case—have you read the pleadings in that case.

Mrs. Motley: Yes, sir.

The Court: Did you observe that Miss Melkild put her alleged right to transfer entirely on racial grounds?

Mrs. Motley: Yes, sir.

The Court: Do you think that she should have had a right to transfer?

Mrs. Motley: I certainly do not, and the transfer should have been denied on that ground alone without even any reference to the plan, because obviously no transfer, as the Fifth Circuit ruled in the Boson versus Rippy case, can be predicated on race.

The Court: Did you read my opinion denying her application?

Mrs. Motley: Yes, sir. I did.

The Court: Did you see in there where I said that it was based entirely on racial grounds?

Mrs. Motley: Yes, sir.

The Court: And was therefore denied?

Mrs. Motley: That's right.

The Court: Then what is—

Mrs. Motley: That's why I say the plan—

The Court: What is your complaint on that?

[fol. 249] Mrs. Motley: That's exactly my point. The plan has nothing to do with her case. She would have been denied the transfer whether we had this plan or not, so that the plan is operated only, operates only against negroes seeking transfer to white schools.

The Court: Well, I don't agree with you. If, if the reverse happened, which did not happen and will not happen, of a white person trying to get into a negro school, the same plan and the same rules were to be applied.

Mrs. Motley: Yes, sir, the Fourth Circuit ruled that in either the Marsh or the Greene case. It said obviously the only people using transfers in this situation would be negroes to white schools, and what you are doing is putting on—a burden on negroes not shared by whites, and that's why the burden is on the school authorities to reassign everybody on a non-racial basis in order to do away with segregation. We will never get segregation on a voluntary basis by having people apply to go to negro schools or negroes applying to go to white schools.

The Court: Well, I didn't take that to be your complaint here. I thought your complaint here was this. Suppose, we have gotten down to the twelfth, eleventh, to the tenth grade now. Suppose a negro applies for transfer over to the tenth grade in a school which has previously been predominantly white. I thought your complaint was that the white children going from the ninth to the tenth grade in [fol. 250] that same school should have the same test as a negro going from a negro school into the same tenth grade.

Mrs. Motley: Yes, sir. That is also our contention; yes, sir.

The Court: Well,—

Mrs. Motley: That the same standard for admission to that tenth grade class must apply to everybody.

The Court: I pointed out in my order setting this matter down that I wanted a hearing on that for this reason. White children moving up from the ninth to the tenth grade have already had the tests. They are already known to the school. It's already known as to all of the requirements contained in the plan, whether they comply or not. Now are you saying that a negro coming from another school

into the tenth grade is given a test different from that given to those who are moving up.

Mrs. Motley: In 1961 they were. But according to the evidence here, the school authorities themselves say they have abandoned this plan and that they are not giving any different tests. They are using the tests already given normally long before anybody thought about desegregation.

The Court: All right. The question, it would seem to me, would be whether the negro transferring over into the tenth grade is given the same test that those that move up—

Mrs. Motley: I don't understand that he is. I under- [fol. 251] stand he is given special consideration as to his application between May 1 and May 15. The white student moves up automatically.

The Court: No, they don't move up automatically. They have to pass the tests.

Mrs. Motley: I don't understand that to be the case, Your Honor. I understand that in—the students already in those schools, they are not given any tests. They are promoted to the next grade.

The Court: Well, that's right; and—

Mrs. Motley: But, if a negro wants to come into the class, he must apply for a transfer between May 1 and May 15 and then they look into his record to see what his academic achievement is.

The Court: So, a white child who wants to transfer would have to do the same thing, even from one white school to another white school.

Mrs. Motley: Yes, but then there's no facts here white students are seeking to transfer.

The Court: Well, that isn't the fault of the plan.

Mr. Motley: But I think the Court has to decide it on what the facts are and the facts are no whites seek transfer to the negro schools.

The Court: Here's what I want you to point out to me, how any negro is discriminated against when he goes from the ninth grade of a predominantly negro school to the [fol. 252] tenth grade of a predominantly white school and that you should point out there are requirements laid down to him to get into the tenth grade which are not required for the students moving from the ninth to the tenth grade.

Mrs. Motley: That's right.

The Court: Now mind you, this is a student going from the ninth grade to the tenth grade, and he has to pass up all his ninth grade subjects before he can be promoted, as you say.

Mrs. Motley: That's right.

The Court: A student going from the tenth grade of a negro school—I should have said the ninth grade of a negro school to the tenth grade has got to show the same scholastic requirement as other people in the tenth grade because you could not have in the tenth grade of any school two standards of scholarship. And as I understood, a negro going from the ninth grade of one school to the tenth grade in another class has to show the scholastic requirements to entitle him to enter the tenth grade, which said scholastic requirements have already been determined by the children in the ninth grade of the same school by passing their examinations, completing the ninth grade. Do I make myself clear?

Mrs. Motley: Yes, Your Honor. But I think the fact is that the negro child that you are speaking of has passed whatever subjects are required of him in that negro school, [fol. 253] and when his application is denied, he goes up to the tenth grade and they will claim and repeat that the curriculi are the same in all these schools. The negroes are not given an inferior education. That all of this is the same. So if the negroes are getting the same thing in the negro high schools, why does a negro student have to prove that he can do tenth grade work in a white high school?

The Court: I don't believe—

Mrs. Motley: And there are whites in that school who are far below the negroes who transferred in every case, because the negroes are required to have a score, and the record shows, ten points above the average in that class in order to transfer. In other words, sir, what they are saying is, "We will permit negroes who are above the average to transfer to that tenth grade class, and the fact that we have half of the class below that average and another half or certain per cent in the middle, and a very few at

the top, that's immaterial." Negroes have to meet a higher standard, and we say they do not.

The Court: Let's get this clear. Do you contend that all of the negroes in every ninth grade in the school system are necessarily of the same capacity and training that all of the white children in ninth grades are, that they are all necessarily—have to be equal in scholastic attainments?

Mrs. Motley: I think that in any class, Your Honor, [fol. 254] in the tenth grade you can have some students whose scores will be—that the scoring system is, say, one to a hundred—you are going to have students in a white school to fall anywhere from zero to a hundred. The same thing is true of a negro high school. You are going to have some students who score ten and you are going to have some students who score a hundred. Now if you are going to place students in schools in accordance with their scores, that's one thing, and that's acceptable. But they are not doing that. They are requiring negroes to have a ten per cent greater score than the average in that class, and that is discriminatory. But as I say, if the requirements for admission to any school is that you receive a certain score on that test, then nobody can complain.

The Court: Well, I'll be inclined to agree with you tentatively for—if the facts show that. I think this. As to the tenth grade in any predominantly white school, the scholastic requirements within certain ranges, of course, I'll say the minimum scholastic requirements should be the same for white students moving up from the ninth to the tenth as for colored students coming from the ninth grade of another school into the said tenth grade. Does that—

Mrs. Motley: Yes.

The Court: —state what you are claiming?

Mrs. Motley: In other words, I think that—

The Court: I would be inclined to agree with you on [fol. 255] that, for the time being anyway. Let's assume that, that that plan is being violated.

Mrs. Motley: Well, I think the record, as I say, shows that.

The Court: Now point out in the record where that's violated.

Mrs. Motley: Well, I think the Superintendent testified —I don't have my copy of the transcript—he testified, in fact, to a—the letter which he sent to Mr. Moore and which is one of the exhibits in here in which he pointed out that under this plan in 1961 negroes who applied for transfer were granted transfers on condition first that they scored ten points, I believe it was, above the average.

The Court: Above the average of what?

Mrs. Motley: Of the class to which they sought admission, or the school. Well, it's plaintiffs' Exhibit 6 of July 31, 1962.

The Court: All right.

Mrs. Motley: Report of Procedures and Recommendations Relating to Pupils Requests for Transfer, and this has to do with those seeking transfer between May 1 and May 15, and it says, Paragraph Three, "The forty-seven students who were requested to take the School and College Ability Tests (SCAT) administered at Washington High School on May 26, were those applicants falling in the following [fol. 256] categories, (a) applicants whose composite score equaled or exceeded the median of the grade level in the school to which transfer was requested." (b) applicants whose composite score came within ten per centile points below the grade median of the school to which transfer was requested. (c) applicants whose composite scores were lower than ten per centile points of the grade level in school to which transfer was requested, but who nevertheless exceeded the national median." That isn't it either. Just a moment.

The Court: That doesn't say that those—

Mrs. Motley: No, that doesn't. I was looking for something else where I thought the Superintendent pointed out—

The Court: Which of those does it say were accepted?

Mrs. Motley: Well, this says, the forty-seven students applying were given a special test on May 26th, and they were selected from a group of applicants who had previously been tested, and this is what I don't seem to be able to find.

The Court: Well, they fell in the classes a, b and c; but it doesn't say which ones were granted and which ones were refused.

Mrs. Motley: No, it doesn't. I thought that there was in this letter to Mr. Moore, which was one of the exhibits, a statement by the Superintendent to the effect that the negro students who were accepted were given a test and [fol. 257] they were required to score ten points above the median for the class to which they sought transfer. Now that, I can't find at the moment. Do you recall that, Mr. Moore?

Mr. Moore: Yes, but I don't remember the document it was.

Mrs. Motley: It may be in the testimony of the Superintendent. Your Honor, I'm sorry. I'm unable to find it, Your Honor; exactly what that was.

The Court: Well, now, on that particular point only, you would think that that feature would be met as to the adequacy of the pupil's academic preparation for admission to a particular school, and I quote that from the plan, if the same academic standards are applied to the negroes coming into the tenth grade from another school as applied to those whites being promoted to the ninth grade—from the ninth grade to the tenth grade, in the same school—

Mrs. Motley: I think—I think we have dealt with this, now, as I recall, in our proposed findings of fact. I'm pretty sure we have this spelled out there, exactly what obtained in 1961 when this plan was in operation, and the point being that the negro students who applied for transfer had to meet a certain score,—

The Court: Well, I've looked—

Mrs. Motley: —in order to get—

The Court: You might look at your findings of fact, starting along about number seventeen where I believe—[fol. 258] Mrs. Motley: Number seventeen, is it? Yes, seventeen and eighteen go into this.

The Court: Nineteen.

Mrs. Motley: Oh, nineteen.

The Court: Nineteen, specifically.

Mrs. Motley: Well I don't think that's it either, Your Honor. It states our contention there that the criteria of the plan should have been applied in the assignment, transfer and continuance of all students in those grades.

The Court: Now look at twenty-one.

Mrs. Motley: Twenty-one?

The Court: I think maybe that gets it.

Mr. Edenfield: Yes, sir.

Mrs. Motley: Yes, I see it here. In 1961, only those negro students of the one hundred and twenty-nine who scored the median score for the eleventh or twelfth grades to which they sought to transfer on the form 2a tests or who scored at or above the national norm for such tests were selected for the form 2b test. Considered for the second tests also were those negro students of the hundred and twenty-nine who scored within ten per cent of the median of the class to which they sought transfer. That's what I had in mind. I think that's where I got the ten per cent of the median of the class to which they sought to transfer. The form 2b test is more of an intelligence test, and so on.

[fol. 259] The Court: That doesn't say—

Mrs. Motley: Yes, sir.

The Court: —that they were given a, required to make ten per cent more than the—

Mrs. Motley: No, I see where I got the ten per cent now. They had to score the median or within ten per cent of the median, as I understand it. Yes, a score within ten per cent of the median of the class.

The Court: Well, isn't that a fair test?

Mrs. Motley: No, sir, because there are white students in the class who did not score that, who are below the median; and as I said before, what they are saying is that negroes have to score the median whereas white students can score below the median, and they are in that class.

The Court: You're saying then that on the academic basis if they make the same grade, as the minimum grade made by a white child going from the ninth to the tenth,—

Mrs. Motley: That's right.

The Court: Would be the test and not the median, is that right?

Mrs. Motley: That's right. In other words, if there can be white students in that class below the median, there can be negro students. The same test has to be given to all students, and those who got ninety in one class, and those who got fifty are in another, whether they are negro or white. But that's the way it operates.

[fol. 260] The Court: I see.

Mr. Edenfield: May I just—

The Court: Yes, sir.

Mr. Edenfield: I would like to point out all this is ancient history, her twenty-first finding, which shows on its face that that was abandoned before 1962. If you look at the last sentence of twenty-one, she says herself, in her own finding of fact in the last sentence, it's not the last sentence; it's the next to last sentence, "In 1962, the applicants for transfer were not given any special tests." As a matter of fact, this business of the median was applied in 1961. For the year 1962, we abandoned it. We gave no special tests, and as I understand what Dr. Letson testified, the only tests now are, that are given are the tests given to every student, white and negro, throughout the Atlanta School System. And the only requirement that one must meet according to those tests is reasonable assurance of academic success in order to transfer. All of this business about the median is gone with the wind and has been since 1961.

Mrs. Motley: But Dr. Letson, I don't recall that testimony previously, I thought that this Exhibit 6 here was what he gave us with respect to what is now being done. There's no date on here, and I think the record ought to clarify that, Your Honor. And if that's the case, I think we are in a situation in which, which is far more nebulous [fol. 261] than we were before. We have here a statement all you have to have is reasonable assurance of academic success. I would like to know what that is.

The Court: Well, I call attention to the fact that you have not shown in the case any one negro that he or she met the test involved and was turned down. And I have said before that if you do not show there was unfairness as to one, I do not see how you can just make a broad charge that it was unfair as to all.

Mrs. Motley: I think all we have to show, Your Honor, is that a different standard is applied to negroes, and even this standard, this vague standard which we have just heard of, reasonable expectation of academic success being applied to negroes and not to whites is another way of discriminating—

The Court: Let's be a little more specific there. Mr. Edenfield says the record shows that the test is just a

reasonable academic test. How would you like to improve on that test?

Mrs. Motley: I would like to give the same test to every student in the tenth grade.

The Court: What kind of test would you like to give?

Mrs. Motley: The achievement test or whatever the academic test is which is given. If that's going to be the standard of assignment—

[fol. 262] The Court: Well, now, I don't know what the general academic test is that's been given. What does the record show?

Mrs. Motley: I think they are described in this letter, and in the paragraphs which we have just gone over. That's plaintiffs' Exhibit 4, I believe, he attempted to describe those tests and to explain them.

Mr. Edenfield: May I see it?

Mrs. Motley: I think that's where he attempts to describe the tests, and in the findings of fact which we have just gone over, there's an attempt to define these tests.

Mr. Edenfield: May it please the Court—

Mrs. Motley: I don't know whether this is—

Mr. Edenfield: —this document to which she refers says specifically, this is a letter to Mr. Moore explaining the questions relating to tests used in evaluating students who apply for transfer in 1961; this—

Mrs. Motley: What about this plaintiffs' Exhibit—

Mr. Edenfield: This is an explanation of what took place in '61 and has nothing to do with what was done in '62.

The Court: Mr. Edenfield, do you have anything in the way of a resolution or anything showing what was adopted in 1962?

Mr. Edenfield: I don't know that we have a resolution, [fol. 263] Your Honor; but I say this, Dr. Letson is here, and he—

The Court: Well, to me it's rather nebulous. We'll wait until the plaintiff—

Mr. Edenfield: All right.

The Court: —completes hers and then—then I'll hear from that.

Mr. Edenfield: I say this, Your Honor. It's in my response to her findings of fact which I read into the record

when we were here before, but that's not testimony. I think it might should come from Dr. Letson.

The Court: Yes, sir.

Mrs. Motley: I believe Dr. Letson testified about this at the last hearing, and I'm trying to find it, if I can. Yes, on page 57, Mr. Edenfield say to, I guess that's Mr. Letson, "Did I understand from your testimony and from your affidavit that no special tests were given applicants for transfer in '62," which means that he has already testified as to that, and I'm trying to find now specifically where—

Mr. Edenfield: Your Honor, I think this clarifies the record somewhat, if she would read the next sentence. I was examining Dr. Letson at this time and I believe this is—does Your Honor have the deposition there?

The Court: Yes.

Mr. Edenfield: Page fifty-seven. "Did I understand from [fol. 264] your testimony and from your affidavit that no special tests were given applicants for transfer in '62?" And answer, "That's correct." Question, "In other words, they were given exactly the same tests given to every other student in the room both from which they came and to which they sought to go?" Answer, "Correct." In his affidavit, also, if Your Honor please—

Mrs. Motley: Yes, but that doesn't say, Your Honor, what score they had to make to get in, and that's what we are trying to find. That says they were given the same tests, but that doesn't mean the same standard applied.

The Court: You don't show there was any different score.

Mrs. Motley: Well, that's what I'm trying to find. I thought there was some indication shown how they determined the negroes to be admitted.

The Court: Well, I—I'll give you an opportunity to find that. Mr. Letson's testimony begins on page twenty-six of this transcript.

Mrs. Motley: Well, I was going to look at his deposition because I see here I keep referring to testimony on his deposition, and we offered the deposition in evidence. I thought we had gone over the procedure applied in each year, Your Honor, very thoroughly.

The Court: On page twenty-six you say this: "Dr. Letson, I'd like to show this application for admission, assign-[fol. 265] ment or transfer, and ask you if that is a 1962 application for admission." Answer, "Yes, it is, with the comment that we did not require a notarization." Now would that application for admission in 1962 throw any light on this?

Mrs. Motley: No, I don't believe it does, Your Honor.

The Court: That's plaintiffs' Exhibit 2.

Mrs. Motley: No, sir. It just says, "Give reason for requesting transfer." It doesn't say anything about tests. But it may be in his deposition, Your Honor. I will have to look.

The Court: I'll say that plaintiffs' Exhibit 2 which I have in my hand here does not have anything in it as to the scholastic attainments made by the applicant.

Mr. Edenfield: Your Honor, while Mrs. Motley searches for it, might I say just a word—

The Court: Yes, sir.

Mr. Edenfield: —about—her motion in this case took on two aspects, as Your Honor recognized. One of them was an assault on the plan itself seeking to substitute a different plan. The other was a contention which we are now arguing as I understand it that the plan is being unfairly administered. Now I have read every case that Mrs. Motley cited and I was prepared last time to discuss them, but Your Honor didn't call on me to do so. Every case that I have [fol. 266] found, including every one she cites where there was a complaint about the administration of an existing plan, there was an effort to show that a named student was discriminated against in a named manner. Now I'll admit there are cases where there have been no plan, where there have been not the slightest move toward desegregation, then you can bring a suit without showing discrimination against anybody. But once you've made a start and once you have a plan which is in force, as I understand the law and as these cases hold, you must come in and you have to show it's unfairly administered, and show that student A applied and that as to him it was unfairly administered. And if I might call Your Honor's attention to the—for example, she cites Norwood versus Tucker.

The Court : Well now, Mr. Edenfield, if you don't mind, let's hold that until we get the record clear.

Mr. Edenfield: Oh, all right sir.

The Court: And let's go back to this. Your first point there as to attack on the plan. Now if, if the plan itself contemplated that there would be unequal tests given to a negro transferor than to whites going to the same grade, if that is in the plan, then it would be subject to criticism. But what I'm trying to find now is a factual matter. What I have before me now is that in 1962 there was a change in the procedures of the Atlanta Board of Education. That in 1962 as shown by plaintiffs' Exhibit 2, there [fol. 267] was an application for admission, which I have before me. The application for admission does not contain anything about scholastic requirements. In the next place, it's been stated by Dr. Letson or Dr. Letson has been quoted as saying that in 1962 the same standards were applied, but until now I have not been able to determine from any source what were the tests, what were the standards applied in 1962,—

Mrs. Motley: Excuse me.

The Court: —and that is the point here where we are rather fuzzy on the record.

Mrs. Motley: Excuse me. I found it.

The Court: Yes.

Mrs. Motley: It's in the deposition of Dr. Letson on page twenty. I will read it, if Your Honor wishes. "Now in May of 1962, have you had any requests in grades ten, eleven and twelve for transfer?" Answer, "Yes." "How many would you say?" Answer, "Approximately three hundred." "Are these negro and white?" Answer, "I am not certain whether any white are included in that group or not." Question, "What is the present status of those applications for transfer?" Answer, "They are in the process of being evaluated." Question, "Have they been given any tests?" Answer, "No, we aren't planning to give any tests this year." Question, "What are you planing to do?" Answer, "The announcement was made that there would be no special tests, and that we would utilize the test scores [fol. 268] that were already available in the schools." Question, "Are any other criteria going to be applied to these three hundred, such as proximity to school?" Answer,

"That will certainly be taken into consideration in the evaluation. But there is no positive policy related to it, just as there were exceptions last year in terms of proximity for justifiable educational reasons." Question, "Are there any other criteria that you can think of that would be applied to these three hundred who have applied for transfers in September"—pardon me—"1962?" Answer, "The test scores in proximity to school"—I think it should read "test scores and proximity to schools"—"subject to variation for educational reasons, plus an interview that will be a part of the procedure." Now there's another test applied to negroes not applied to whites. Question, "Same interview committee?" This is with reference to 1961. Answer, "Not necessarily the same personnel, but generally constituted in the same way." Question, "The test scores are going to be used in the same way that they were last year? That is, to determine whether the transferee scores a grade which is the average for the class in the school to which he seeks to transfer as you explained it before?" Answer, "That same calculation I am certain will be made. It doesn't necessarily mean that it will apply as rigidly this year as it has in the past." And then it goes on to say how many schools are going to be involved and so forth.

[fol. 269] The Court: Let me ask you this question. If, instead of giving tests, they use the tests already given in the respective schools involved, why would not those tests show the educational qualifications of the student.

Mrs. Motley: They do. I should think that the—they give a test which shows the achievement of the student and that then they give another one, an intelligence test, which I guess shows his potential. And I'm not certain as to what these tests measure, but I think if the same test is given in a negro school that's given in a white school, then you will have negroes making a certain score and whites, and so forth, and they will vary on that scale, and if this education they are getting is the same,—

The Court: That should be clarified for this reason. Let us assume that there are two schools involved, and let us assume that the general level of academic scholarship and standing in one is higher than the other. Now a test is nothing but a relative thing. A person making, say, seventy

per cent in one school possibly might not make but sixty per cent in another. Therefore, if you are going to take these tests entirely on the basis of the grades made in the different schools, they may not, may not be a correct measure. There are points there that might be a good idea to get Dr. Letson maybe to explain that to us, because I do not know how the School Board is administering this matter of using the same tests which have already been given, which [fol. 270] may be the annual grades of the student in the different schools. Now if, if you have that in the record, we wouldn't need any further testimony. If it is not in the record, I think it ought to be clarified.

Mrs. Motley: Well, what we have in the record is what I have just read, is that the test scores are going to be used in the same manner as last year, and we are clear on how we did it in 1961, and he is saying he is certain the calculation would be the same this year. If he is using some other test, I agree that's not in the record.

The Court: What page of the deposition?

Mrs. Motley: That's page twenty through page twenty-one or to the middle of page twenty-one, I guess.

Mr. Edenfield: May it please the Court, I think that's perfectly clear to me. I thought it was to Mrs. Motley and to the Court. What happened is that in 1961 when a child sought a transfer, they brought him in and gave him or her a special test and applying the criteria of the plan to a determination based on the outcome of that test, whether or not the transfer would be granted. For 1962 we didn't abandon the criteria of the plan, but instead of calling in those students who wanted transfers and giving them special tests, we took standard tests given throughout the Atlanta schools, the same tests in the ninth grade, went straight through the schools, negro and white, same for the eighth grade. In other words, these are standard tests [fol. 271] given on a nationwide scale.

The Court: Well, that clarifies—

Mr. Edenfield: And your accomplishment in it in Timbuktu will be comparable, a comparable accomplishment to somebody else in Key West. As I understand it, they are nationwide tests, and when you make a seventy on it, that means you scored a certain amount and a certain level of

education, no matter where you are, whether it's a negro school or a white school or north or south, east or west.

The Court: What's the name of that test? It has a technical name in here?

Mr. Edenfield: SCAT, I believe.

The Court: One of these alphabetical combinations, I think. SCAT?

Mr. Edenfield: SCAT.

The Court: I think that's right.

Mrs. Motley: Of course, I think it's clear that the School Board also has the burden of showing that the curriculi offered negroes in these schools in which they are administering these tests are the same as in white. If they are going to use a test which they claim is the same for all students, they first have to show that it's a fair test, that the negroes have the same curriculi as the schools to which they seek admission, and they cannot just say, "Well, you see, we gave negroes the same tests, and they made a lower score." They have to show that the negroes had ini- [fol. 272] tially the same opportunity to make the same score.

The Court: I don't follow you on that. That's—let's assume that the scholastic attainments of students in the tenth grade of a white school, or vary that of the tenth or ninth, the same grade in a colored school. Would you, would you say if that were true, unfortunate though it may be, that nevertheless it would be wise to take a negro from the ninth grade and put him in the tenth grade when he could not measure up to the attainments of the white children in the tenth grade? Would you be doing any benefit to the—to a negro to put him in that situation.

Mrs. Motley: Well, I think they could only exclude him or say he was not eligible for that white tenth grade class when they show he had the same opportunity to make the same score as the white student in the school which they maintained for him.

The Court: If the same test was given to him which they call the SCAT test and he did not measure up to the minimum requirements of the tenth grade in a white school, are you saying that he should be admitted anyway because he hasn't or wasn't given the opportunity to attain that.

Mrs. Motley: Oh, yes, because what they are then saying is, "Although we gave you an inferior education all along, we now take advantage of that to continue to give you an inferior education. And we'll take advantage of that fact right now and say 'You don't measure up.'"

[fol. 273] The Court: Well, now, Mrs. Motley, I'm no educator and no student of this, but like Mr. Will Rogers said, most of what I know I read in the newspapers, and I have observed in certain tests in Washington, D. C. and other places, that they say the whole environment plays a big part in the progress that a child in a school makes, and I do not see, though, how you could satisfactorily run a school system, regardless of the reason, because what we are saying here, it would apply just as well to a white child in a slum area where people were unfortunate, and nobody blames anybody for misfortune or not having an opportunity, you understand; but that, whatever the reason, it doesn't seem to me to be logical, a logical way to run a school to move a child from the ninth grade in a school who is, the intellectual level may be lower, regardless of the reason, and put them in the tenth grade in another school where you will have to fall behind and can't keep up. Do you say— Are you saying that they should do that?

Mrs. Motley: Precisely, Your Honor; and that's why they give two tests, one of which is an intelligence test to determine the native ability of that negro student from the environment of the home. His potential. And the students in those schools are assigned solely on the basis of their achievement, because every educator knows that his achievement may be one thing, but his native intelligence another. And that's why they give two tests, because the [fol. 274] children who come from those inferior homes have a potential which the school has a duty to develop.

The Court: Then if they had the—they did not have the training, educational attainments, but if they had the intelligence to be able to keep up with those in the tenth grade, you would say put them in the tenth grade even though you got to skip over a certain amount of learning which they did not receive? Is that it?

Mrs. Motley: Well, you have to provide in that school the learning which he should have had. The school's duty is to educate people in accordance with their potential

and not say, "Well, we are sorry the world outside is one way; we can't do anything for you." That's not a school.

The Court: Well, now if you have any citations by any Court that says that's good law, I'd like to read it, because I have never seen anything indicated except this, that in placing any child, regardless of race, color or anything, into any class with other students, that there has to be some comparable standard of educational attainments where he would be in a measure equal.

Mrs. Motley: Well, you know what's usually done, Your Honor, is that when you live in a certain area, you go to that school regardless of your achievement or intelligence or anything else, and you just fall wherever you fall on the curb. And that's what we are suggesting with our proposed plan, that students are to be admitted to a school [fol. 275] and whatever his potential is, whatever—

The Court: You are right but—

Mrs. Motley: —his achievement is, that school has a duty to help him.

The Court: But by saying all children in the same area go to the same school doesn't mean they are all put in the same class by any means.

Mrs. Motley: That's right, Your Honor.

The Court: When they get to that school, they go up or down,—

Mrs. Motley: That's right.

The Court: —in accordance with what they are able to do.

Mrs. Motley: That's right.

The Court: But, if you say they are going from one school to another, and they didn't apply the same tests, I want to ask you this, you are saying if they go from a school where the educational standards are low in the ninth grade to another school where the educational standards are high, and go into the tenth grade, that they should go into there whether or not they are equal in capacity to the students in the tenth grade.

Mrs Motley: Yes. If it's done on a geographical basis, if a student moves from one area of the city to another area of the city, normally and under the segregated system, he went to the nearest school, and they gave him tests in school, [fol. 276] and he may have been in the D class or the C

class or the A class. But he went to that school, because that's where he lived, and in the school environment he was entitled to whatever level he fell into, whether he was an A student or B student or D student.

The Court: That's exactly—

Mrs. Motley: That's why they give tests, and that's what we are suggesting by our plan. If the school authorities would like now to give these tests and to say, "Well, you will be admitted if you meet a certain score, and this applies to negroes only," and we say that the law is that that cannot be; that the same standard has to be applied to negroes as is applied to whites, and is not being done here, and that the simplest standard is a geographical location standard for the assignment of pupils, and once they get in that school, those students will have to do whatever they do by way of tests.

The Court: I don't see any relationship between geographical area and educational standards because I say again, regardless of the area, when they go to school, they will still be in an appropriate bracket according to their educational requirements, and you cannot take everybody from any area and put them all in on the basis of area. That's no measure necessarily of their scholastic standard. And if they give this test which they call SCAT, seems to be a nationally recognized test, or tests, and if they give it [fol. 277] to all students, colored or white, that—that seems to me would be an equal test as to their scholastic attainments only. I'm not talking about anything else but scholastic attainments. I can't see that there's any discrimination on that basis.

Mrs. Motley: Well, I think there is because you see what they'll then be doing, as I say, is taking advantage of the low levels of achievement in the negro schools resulting from segregation, and say, "Now, you see, you don't measure up," and that's why it's unfair and I don't think the Courts are going to sustain that.

The Court: I want the record to be so clear that no one can misunderstand it, and if I am misquoting you, I want you to correct it. You are saying that if a negro goes from the ninth grade of a colored school up to the tenth grade of a white school and that if under this test, SCAT, what-

ever that means, he does not have the scholastic ability to qualify for the tenth grade in the white school, that he should nevertheless be admitted to the tenth grade of the white school because society for some inexcusable reason has not qualified him while in the colored school, up to the basis where he would qualify in the tenth grade. Now did I state your position correctly.

Mrs. Motley: No, sir. I would like to try to state it.

The Court: All right.

[fol. 278] Mrs. Motley: I think that the students in the tenth grade should all be given the same test, if a test is to be given, as a basis for assignment to that grade. If the School Board insists on giving a test, that test in order to be a fair test must be shown to be given to students who have had the same basic training to qualify to take the test, and they cannot impose upon students a test where it appears that students have not had the same basic training in the school for that test. Now if they can show that negroes have had the same curriculi, the same quality of teachers, the same length of training to meet that test, then I say it's a fair test. And, that the students may be assigned on the basis of the score which they make on that test; all of the students. That negroes may not be required to meet the median score or to fall within ten per cent of the median to get into that class, because that's a distinction based on—against negroes, or a color distinction based on race, and there can be no such separate classification of negroes.

The Court: Let's leave the median out for the time being. The effect of your contention if carried out would be, though, that if a child came from the ninth grade of a negro school where the standards are very low, and we may assume that society is at fault for the ninth grade from which he came being very low, that nevertheless he should be admitted into the tenth grade of the white school, right.

[fol. 279] Mrs. Motley: He should be admitted to the tenth grade of the white school according to the standard applied to the white children already there, or who are to be assigned there. Now if the standard is residence, then he will be admitted, if he lives in that area of that school.

The Court: Now just a moment.

Mrs. Motley: And if the standard—I'm sorry.

The Court: Now just a moment. If you, no one has said that the standard to get into a school, a certain grade in that school, is necessarily a geographical—

Mrs. Motley: Well, the Superintendent said that, and I think—

The Court: Not into the grade, Mrs. Motley. I said to get into a school.

Mrs. Motley: Well, I just read from page twenty to twenty-one, and he said proximity to schools would be taken into consideration.

The Court: Yes.

Mrs. Motley: As to these three hundred who are applying.

The Court: Yes.

Mr. Edenfield: That was in 1961.

Mrs. Motley: In other words, negroes have to show that they live nearer to that white school. That applies to the three hundred. Moreover, he is going to give them an interview.

[fol. 280] The Court: Every school plan I have ever seen, and going back to the reading of the earliest decisions, back a hundred years ago, this placement plan is not—is nothing new. They've all had area, geography as an element, and that's about all he said here. It is just one of the elements.

Mrs. Motley: But he doesn't show that applied to the white students admitted or to be admitted, and they may have come from the other side of Atlanta.

The Court: All right. Anything else?

Mrs. Motley: That's all for the plaintiff, Your Honor,—

The Court: All right.

Mrs. Motley: —unless the Court has some other questions.

The Court: I'll hear from the defendant.

Mr. Edenfield: May it please the Court, I personally would like to say that I think Mrs. Motley has the burden of proof in this matter all mixed up. She says, for example, that the burden is on us to show that the curriculi in these schools was the same. She says that the burden is upon us to show that white people are treated the same way. As I understand these cases, the several cases that she

cites, the student came in and said, "You are applying this plan in such a way as to discriminate against me, and I want an injunction, and I want an order that I be ad-
[fol. 281] mitted to a particular school." Now that is not what she does. For example, in her case, of Norwood versus Tucker, which is the Arkansas case, this was a suit by an individual plaintiff, and certain intervenors complaining of what—of their individual school assignments. And the City of Little Rock had adopted a pupil placement plan placing or basing it entirely on attendance area, but in applying it, they discriminated against negroes. This negro came in and said that this was being administered in such a way as to discriminate against him, and the Court agreed with him and held it unconstitutional, and then here's what the Court said, among other things: "If the criteria should be applied only to negroes seeking transfer or enrollment in particular schools and not to white children, then the use of the criteria should not be sustained," and so on, and so forth. But everyone of these cases, Norwood versus Tucker, Jones versus Alexandria, which is one of the cases she cites, are suits by an individual plaintiff complaining of denial of their individual applications for transfer. Exactly the same thing. Dove versus Parham, 282 Fed. 2d, 256, was a suit by an individual plaintiff complaining of the denial of their individual application to attend a particular white school. The Board adopted a plan, had applied criteria, but it left the racial situation exactly as before. Then this individual came forward and says, "You've discriminated against me." Exactly the same thing is true in Dodson
[fol. 282] versus Charlottesville, another case she cites. This was appealed by an individual negro plaintiff complaining of the denial of his individual application to attend a particular white school. In everyone of these cases, the person who claims to have been discriminated against not only was the burden put on them, but they assumed it and they carried it. Here, as I understand, she says, "We don't have to prove anything. It's up to the defendants." And on that basis, I say frankly, she hasn't made out a case that brings her within the authority she cites. Now it's quite a different situation, if the Court please, as far as the Memphis case or the Tampa case where there had never

been any effort to desegregate, where there had never been any progress made, where there had never been a plan filed. In those cases, in all fairness I must say that the Fifth Circuit has swatted the school board hard. It has put them in a vise so to speak. On the other hand, in those areas where there have been plans submitted and approved and where there has been some progress made, both in the Fifth Circuit and in the Fourth Circuit the Courts have been very tolerant in encouraging that progress and in not slapping down the school board. For example, in this case of Dodson versus Charlottesville, the Board itself came in and admitted that they were unfairly applying their own plan and they told the Court they were doing it unfairly. The Court held that the plan was acceptable, but was not [fol. 283] being administered fair between white and negro pupils, and, because the Board departed from the plan itself. But the Board was affirmed because the Board had made a start, had acted in good faith, and admitted discrimination, but said action was only temporary. In other words, in those places where a start has been made, where a plan has been adopted, the Courts have leaned over backwards to go along with it. In those instances, and in those areas where there has been no start, the Courts have slapped down, and incidentally, this is the only case I have found in, not only among the ones she cites, but anywhere else, where there was an attack upon a plan itself which had been approved. In this Dodson versus Charlottesville case, they sought to overturn a plan which had previously been approved, just as she seeks to do in this case. Not only did they not overturn the plan but they affirmed the School Board, although admittedly it was violating its own plan. For that reason, Your Honor, we respectfully submit that she, if there were any, she had any rights in this case, she has not carried the burden of showing it.

The Court: What do you say about speeding up the plan.

Mr. Edenfield: Your Honor, the Supreme Court said we should move with deliberate speed, and the Courts have since said that the accent should not be put any more on speed than it should be put upon deliberate. I'll say we [fol. 284] are moving with deliberate speed. The number

of students this year who are integrated are more than last year, both in number of grades and in number of students, and I respectfully submit we are making progress, and if allowed to continue making progress, the situation will solve itself to the satisfaction of all concerned, I believe.

The Court: What would be the effect on the Atlanta School System if, I believe they asked here that you start at the first grade too, what would be the practical effect of integrating all first grades in the School System.

Mr. Edenfield: The practical effect of it, Your Honor, I don't know that I am enough of an educator to answer that, I don't know. I do know this, that the Courts, as Your Honor is aware, have said that we do not have to follow any crash program of wholesale integration. Now in some places, as Your Honor knows, they have started in the first grade rather than at the—as we did in the high schools. As to a comparison between them, I just wouldn't know what the impact would be.

The Court: Let me say this. When this matter first started, I had some question in my mind whether it ought to start with the first grade or whether it ought to start at the other end. The School Board suggested starting in the twelfth grade. I had before me evidence then, and it's in the record, and was carefully considered, as to the number of whites and number of negroes in the Atlanta schools, [fol. 285] the shortage in housing, the change in the residential pattern, and all of those factors, and when I accepted the plan starting at the twelfth grade, I was largely prompted to do so by the fact that it didn't seem practicable to start in the first grade, because if you start in the first grade, you have the entire grade changed, and the building situation and all the other factors in there seemed to me that that would have been a little bit too drastic with which to start out. Now I don't have any, any evidence before me to show that there's any change in that situation at this time.

Mr. Edenfield: I don't think there is, Your Honor.

The Court: And I don't know whether the burden is on the defendant to show that that would be difficult or some reason why that shouldn't be. If the defendant wants to show that, I'll give them an opportunity to do so.

Mr. Edenfield: You mean the movants?

The Court: No, I mean if you, if your clients, if they want to show that the speed up plan proposed would be difficult to attain, I'm not saying who has the burden of proof,—

Mr. Edenfield: Well, Your Honor, it appears to me that we have a plan; it's been approved and it's working. To change to anything it appears to me would disrupt our program. Now it may be we can put up some evidence on it. I would like to ask, to talk to my client just a minute. [fol. 286] The Court: I wish you would. We'll take a twenty minute recess.

(Whereupon, Court was recessed at 11:12 A.M.)

Recess

(Whereupon Court reconvened at 11:28 A.M.)

Mr. Edenfield: May it please the Court, Mr. Latimer and I discussed this briefly with Dr. Letson during the intermission, and we didn't come prepared to put up any evidence today about a new plan.

The Court: Yes, sir.

Mr. Edenfield: We came to defend the one we have. Frankly, we feel this way about it, that Dr. Letson says that the speed of desegregation is a matter of judgment and a matter about which there are all shades of varying opinion: that he is of the opinion that our judgment was good in the first instance and that if our judgment was good then, our judgment's good now. The reasons given in the first one, when this plan originally was adopted as I understood it, as I recall it, was that when a child gets to the eleventh and twelfth grade, he has an additional background on the basis of which you can make comparisons. Of course, those factors are still present. We felt then and Dr. Letson still feels now that it would be better to start and to continue this program from that end rather than the other end and let it come down to the young, to the unnurtured, to the uneducated in due course. Furthermore, [fol. 287] we feel like there's nothing to change our judgment that we made before, and that if the burden rests on anybody, it doesn't rest on us. It rests on the others, and

for that reason, we just don't have anything to present at this time.

The Court: Well, I agree with you, and the results obtained in Atlanta have been very highly satisfactory. There has been harmony and there has been cooperation and it's been commended in a great many news articles and other matters throughout the country, and I have personally felt that that was more important than just a little bit more speed.

Mr. Edenfield: Yes, sir.

The Court: But what I really had in my mind was this, that the proposed speed up plan which was put in here at a rather late date, without any—any—very much urgency or any force behind it, been given in this case, very little attention been paid to it by the proponents of it, contemplates some things that I thought might work out a practical inconvenience such as this. As I said before, starting in the —in the first grade, it would be not selective or not by transfer, but more or less wholesale; and I didn't know how that would work out in a practical way.

Mr. Edenfield: Your Honor, I think that was another thing that was running through my mind. Any speed up from the other end would approach a crash program, which as I understand it, all the Courts have said was not neces- [fol. 288] sary in this area.

The Court: Now I'm willing to let it go as it is, or if the defendants change their minds anytime before I make my ruling on this and care to put in any evidence on that, I— I'll be willing to accept it. But I'll take things as they are now.

Mr. Edenfield: All right, sir.

The Court: Is there anything else from either side? Now I'll take the matter under advisement, ladies and gentlemen, and decide it as soon as I possibly can. Close the Court until two o'clock.

(Whereupon, Court was closed at 11:40 A.M.)

End of Transcript

Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 289]

In United States District Court

Order of Court on Plaintiffs' Motion for Further Relief—November 15, 1962

Statement of the Case

This Court on January 20, 1960 approved a Plan of desegregation proposed by defendant Atlanta Board of Education. Details of that Plan may be obtained by reference to 188 F.S., 401 and 188 F.S., 412. On September 13, 1960 the Court provided the Plan in question should begin in September, 1961 and apply to the eleventh and twelfth grades of the schools. The Plan has been in operation for the two school years beginning September, 1961 and September, 1962 respectively, and pursuant thereto fifty-three Negro students have transferred from schools previously Negro schools to schools previously all white schools. This was done peaceably and without violence, largely due to the unusually effective methods employed by the Mayor of Atlanta, its Chief of Police, and all groups working in concert with them.

The Plan adopted by this Court on January 20, 1960 was the Plan which was adopted upon the insistence of plaintiffs in order to comply with the mandates of the United States Supreme Court and other courts, to the effect that discrimination should cease and that compulsory segregation should no longer be enforced in the Atlanta Public Schools.

It is significant to note that the Plan in question at the [fol. 290] time of its adoption met with the approval of these plairtiffs. An appeal from this Order of Court was filed but upon motion of the plaintiffs was permitted dismissed by the Court of Appeals.

Grounds of the Motion

A large part of the motion filed April 30, 1962 is couched in vague and indefinite terms and is largely a repetition of charges made against defendants concerning discrimination before the Plan had been put into operation. Thus plain-

tiffs seek an injunction against defendants "from continuing to maintain and operate a segregated bi-racial school system," from "continuing to assign pupils to the public schools upon the basis of race and color," from "continuing to designate schools as Negro or white," from maintaining "racially segregated extra-curricular school activities."

Complaint is also made of alleged assigning of teachers and others on basis of race and color and maintaining a dual system of school attendance area lines.

There is no disputing that discrimination had existed prior to the Order of this Court of January 20, 1960, and that the Order of that date was designed to eliminate the discrimination over a period of years. Even plaintiffs' counsel upon the original trial disclaimed any purpose of seeking to have "wholesale integration." The only question [101. 291] then involved was the plan by which discrimination could be eliminated; a Plan was carefully prepared and adopted and no appeal taken. The Plan is eliminating segregation, but until it has completed its course there will of course still be areas (in the lower grades) where segregation exists. The Court is therefore at a loss to see how anything could be accomplished at this time by "an order enjoining defendants from continuing to maintain and operate a segregated, bi-racial school system," for the Court has already taken care of that in its decree of January 20, 1960. There is no evidence that defendants are "continuing to designate schools as Negro or white," nor that they are maintaining "racially segregated extra-curricular school activities."

The assigning of teachers and other personnel on the basis of race and color is not now passed upon but is deferred (as other courts have done) awaiting further progress made in the desegregation of the students.

The objection to said Plan of Desegregation which most impressed this Court related to the charge that it caused discrimination between a Negro transferring to a grade in a previous white school, in that certain tests were required for the transfer to which the white students promoted to the same grade were not subjected. At the hearing of this motion, however, it appeared without dispute that defen-

dants beginning in September 1962 had ceased using the [fol. 292] tests required of transfers as used theretofore. In lieu thereof as of September 1962 the school authorities gave to all pupils in the school system a nationally recognized test known as the "School and College Ability Test" (SCAT). (See Transcript, p. 22.) Testimony of Superintendent John Letson above that this test was given to all students, Negro and white, and this testimony was not disputed. Proximity of the pupil to the school involved was also considered by the Board, as were certain other criteria contained in the Plan approved by this Court on January 20, 1960.

Neither does the evidence show that defendants are maintaining a "dual system of school attendance area lines." Proximity to the schools in question is a factor considered by the defendant Board. It is not shown that defendants are acting arbitrarily in connection with the assignment of pupils in relation to their distance from the school. It does appear that area lines (where such exist) are sometimes changed for the sole purpose of relieving over-crowded conditions in the schools.

Plaintiffs' Proposed New Plan

The original motion filed by plaintiffs on April 30, 1962 made certain attacks on the Plan of Desegregation established January 20, 1960, but did not make any complaint that the Plan contemplated too much time for the completion of the desegregation. Not until the Court required the [fol. 293] parties to file Findings of Fact and Conclusions of Law did it occur to plaintiffs to make any effort to speed up the transition. However, on July 20, 1962 plaintiffs filed a paper entitled "Plaintiffs Proposed Plan of Desegregation," which does bear some similarity to the Plan adopted by the Court on January 20, 1960, already in operation for a period of two years. However, the Proposed Plan accelerates the dates to which the various grades might be integrated (which in September 1963 include the ninth, tenth, eleventh and twelfth grades) so that in September 1965 "all pupils and personnel in grades one, two and three shall be desegregated in the same manner in which the other grades are desegregated, as set forth above."

This suggestion by plaintiffs' counsel that the Court summarily speed up the Plan already adopted without any evidence to show that the new Plan is practicable or feasible, is no doubt inspired by one or more recent decisions by appellate courts which do summarily establish a Plan of Desegregation. In all such instances, however, that action was taken by appellate courts because the school authorities in question had not proposed a Plan, or the district judge in question had not ordered a Plan. This Court finds no precedent for a trial judge summarily changing and speeding up a Plan, already in operation for two years, without some facts or circumstances requiring the same.

When this Court approved the Plan on January 20, 1960 [fol. 294] many local conditions mitigating against a more speedy transition were considered (see 188 F.S., 401), these factors included the following:

There were in Atlanta 116,000 pupils, of which approximately forty per cent, or some 46,400, were Negroes. There was a rapid influx of children of school age into the city and a shortage of some 580 class rooms, many classes then being held in churches and other buildings, and many having double sessions. Other problems confronted the School Board, caused by slum clearances and changes in residential patterns, to which may now be added complications arising out of large tracts of land being condemned for expressways.

The United States Supreme Court has ordered that segregation be eliminated "with deliberate speed," and has invested the trial judges in the first instance with some discretion, bearing in mind all local conditions, as to the timing of a Plan of Desegregation. The Plan heretofore approved by this Court, and now under attack, has been administered fairly and in good faith by defendant Atlanta Board of Education, the local authorities have given utmost cooperation in maintaining law and order, and the number of students being transferred each year from previously designated colored schools to previously designated white schools is increasing at an accelerated rate each year as the lower grades are reached. This Court feels that the public [fol. 295] interests demand that the Plan now in operation

be continued according to its terms and not be summarily displaced by the new Plan of Desegregation proposed by plaintiffs.

For reasons set forth above plaintiffs' motion for further relief and plaintiffs' motion to adopt a Proposed New Plan of Desegregation are denied.

This the 15th day of November, 1962.

Frank A. Hooper, United States District Judge.

[fol. 302]

IN UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

No. 6298 Civil Action

VIVIAN CALHOUN, et al,

vs.

MEMBERS OF BOARD OF EDUCATION, CITY OF ATLANTA, et al.

ORDER OF COURT—June 16, 1959

Statement of the Case

In this action a number of negro children of Atlanta seek to obtain an injunction against defendants who are in charge of the operation of the Atlanta Public School System "from operating the Public School System of Atlanta on a racially segregated basis and enjoining the defendants from refusing to permit the minor plaintiffs to attend any public school in the City of Atlanta which they are otherwise qualified to attend solely because of their race and color". The plaintiffs do not allege that they have made application for admission to any particular school in Atlanta and have been denied admission solely on account of their race. They do contend, however, that defendants "are presently operating the Public School System of Atlanta

on a racially segregated basis pursuant to policy, usage, [fol. 303] regulations and laws of the State of Georgia enforcing racial segregation in public institutions (Para. 9)". It is alleged that the next friends of those minor plaintiffs being their parents, have filed between the dates of June 1955 through September 1956 written petitions with defendants to reorganize such public schools on a racially non-segregated basis in compliance with the decision of the United States Supreme Court in the case of *Brown* vs. *Board of Education*, 347 U.S. 483, but defendants have failed and refused to do so.

Just prior to the trial of the case this Court entered an Order to the effect that the Court would take judicial cognizance of the fact that the Public Schools of Atlanta had been operated, and were being operated, on a racially segregated basis. This assumption by the Court was based upon certain acts of the Georgia Legislature preventing the mixing of the races in the schools, the political campaigns of many officials pledging the continuance of segregation, public meetings held in the City of Atlanta debating the question as to whether, should the Court enjoin segregation, the Atlanta Public Schools should be closed and private schools organized, or whether on the other hand there should be so-called "token integration" similar to that as contemplated by a recent Act of the Legislature of the State of Alabama, which has had the approval of the United States Supreme Court.

Counsel for defendants, however, made vigorous objec- [fol. 304] tion to this assumption upon the part of the Court and expressed a desire to produce evidence to show that defendants had not pursued a policy of racial discrimination in violation of the principles set down by the United States Supreme Court, by the Fifth Circuit Court of Appeals, and by many other appellate courts in the land. As the burden of proof on that issue rested with the plaintiffs the Court heard evidence on the same from several witnesses, but did not find it necessary to hear from some forty-one witnesses in the court room which were sworn by the parties. Witnesses on the same issue, which would have been cumulative, were not heard. The trial consumed one

usual court day, extending from 9:30 A.M. to 4:30 P.M., at the conclusion of which the Court announced its ruling but, on account of the pressure of other trials, has not been able until now to prepare Findings of Fact, Conclusions of Law and a Final Decree.

The Facts in the Case

The testimony was undisputed to the effect that plaintiffs are negro children of the City of Atlanta, attending its public schools, and that such schools are under the control and supervision of defendants. It is undisputed that defendants now, and ever since the establishment of the Atlanta School System, have been providing separate schools [fol. 305] for white and negro children, although defendants through their counsel contended that such separation arose through the choice of the negroes themselves. The sole issue of fact therefore was whether or not racial discrimination existed in the custom and practice of the operation of the Atlanta Public Schools. The Court finds that the undisputed evidence in the case demands that this question be answered in the affirmative.

Plaintiffs put upon the witness stand one of the defendants, Dr. Rufus E. Clement, a negro who had been elected and re-elected by the citizens of Atlanta to the Board of Education. He testified positively that racial discrimination did exist. Miss Ira Jarrell, for some years Superintendent of the Atlanta Public Schools, she being a defendant who was sworn as an adverse witness, testified as to the manner in which school children, negro and white, were allocated to the various schools. While she did not testify that definite areas surrounding each of the schools were designated for either white or colored, she stated that for the most part children did attend the schools nearer to their residences, but that requests by students and their parents to be allowed to attend other schools were usually granted.

Plaintiffs put in evidence excerpts from the Minutes of many meetings of the Board of Education from which it appeared that certain schools of the city were designated as "colored", others as "white". Thus, the Minutes of April [fol. 306] 11, 1955 showed a recommendation for the election

of a certain person as a teacher under the classification "colored, elementary" and two others under the classification "colored". Similar references are made in the Minutes of some ten other subsequent meetings, extending almost to the date of the trial. There was also undisputed evidence to the effect that in connection with the issuance of bonds for the building of new schools through many years, designation was made of such schools as "negro" or "white".

If, however, there exists any room for doubt as to racial discrimination prior to 1955, it would be dispelled by the circumstance that during that year and for some years subsequent thereto, the plaintiffs in this case have filed written petitions with defendants seeking the ending of racial discrimination. They were not advised that racial discrimination did not exist, but on the other hand were informed that the matter would be taken under consideration and studied. There the matter has rested for some four years.

Nature of the Decree to Be Rendered

At the opening of this trial the Court announced that relief would be awarded petitioners similar to that granted by the United States District Court for the Eastern District of Louisiana, which was approved on appeal by the Fifth Circuit Court of Appeals, in the case of *Orleans* [fol. 307] *Parish School Board* vs. *Bush*, 242 F. 2d 156, decided April 5, 1957. In that case approval was given to a judgment of the trial court which enjoined the school authorities "from requiring and permitting segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially nondiscriminatory basis with all deliberate speed as required by the decision of the Supreme Court in *Brown* vs. *Board of Education of Topeka*, 349 U.S. 294". In that case, as in this one, it appeared that the plaintiffs "as negro students, were seeking an end to a local school board rule that required segregation of all negro students from all white students". They "were not seeking specific assignment to particular schools". The Court stated:

"As patrons of the Orleans Parish School System they are undoubtedly entitled to have the District Court pass on their right to seek relief."

Even the most ardent segregationists have now acknowledged that the *Brown* decision is the law of the land. Legislatures in many states, including Georgia, have since the rendition of that decision been passing legislation seeking to avoid its consequences. For this Court to declare as law that which is not law would be not only a futile gesture, but a great disservice to our people. It would add to the confusion already existing in the public mind, it would build up hopes destined to be destroyed on appeal, and it would [fol. 308] delay the efforts now being made by our people to find the best solution possible to a critical and urgent problem.

This Court is under no duty, nor does it have the power, to order integration, but it is compelled to enjoin racial discrimination. It is not the function of the Court to suggest to defendants how such discrimination can best be eliminated, but the plan must originate with the defendants and be submitted to the Court for approval. Nothing said by the Court during the trial of this case was intended to be an expression of opinion by the Court as to the plan, but the Court did assume, and now assumes, that any plan submitted would contemplate a gradual process, which would contemplate a careful screening of each applicant to determine his or her fitness to enter the school to which application is made. The Supreme Court has said that school authorities must proceed with "deliberate speed" toward the elimination of racial discrimination, and this Court interprets the expression "deliberate speed" to mean such speed as is consistent with the welfare of all our people, with the maintenance of law and order, and with the preservation if possible of our common school system. The custom and practice of maintaining separate schools for negroes and whites has existed in this state for many years, with the approval of the highest courts of the land, and it cannot rapidly and suddenly be ended.

[fol. 309] It will be necessary for defendants within a reasonable time to signify to this Court the manner in which defendants propose to eliminate racial discrimination.

This Court fully recognizes the difficult position in which defendants herein are placed. If they integrate the schools, all State money under existing laws will be cut off and it may be that such funds are necessary for the operation. The continued operation, however, with discrimination as in the past, will not be permitted.

In cases such as this a solution must be found to fit the particular conditions which exist. This Court feels that it should give defendants a reasonable opportunity to submit to the Court a plan whereby racial discrimination will be discontinued. However, such a plan may be submitted subject to approval thereof by the Georgia Legislature, and the Court would allow sufficient time for the Georgia Legislature to act upon the same. If defendants submit a reasonable plan, and it should be approved by the Court, defendants would have done all that they are able to do under the circumstances. Failure of defendants, however, within a reasonable time to submit any plan whatsoever shall be construed by the Court to be a refusal to do so. The Court will do everything in its power toward working out any possible solution to this matter within the framework of the law, as declared upon repeated occasions by our appellate courts. Counsel for plaintiffs shall submit to [fol. 310] this Court a decree in conformity herewith, serving defense counsel, who shall within ten days of such service notify this Court of any objections thereto.

This the 16th day of June 1959.

Frank A. Hooper, United States District Judge.

[fol. 311]

IN UNITED STATES DISTRICT COURT

ORDER OF THE COURT—January 18, 1960

Defendants, under Order of this Court, on January 5, 1960 filed in this case an amendment to the proposed Plan of Operation of the Atlanta Public Schools. After careful study of the new and amended Plan the Court is in doubt

as to the meaning of certain portions thereof contained in Paragraphs Four to Ten inclusive, and as to other portions therein included the Court is in doubt as to the sufficiency thereof, and the phases of the Plan as to which the Court feels amendments would be proper are the following:

1—Paragraph Four provides that applications for the admission, assignment or transfer of pupils shall be filed between May 1st and May 15th of each year. In Paragraph Seven it is provided that the Superintendent may in his discretion require interviews with the child, etc. If such interviews are contemplated to be had after the filing of the application and before a decision thereon within thirty days thereafter, this should be indicated.

2—In Paragraph Eight it is provided that objections to action of the Superintendent may be filed with the Board of Education, and unless a hearing is had the Board shall act upon the same "within a reasonable time". Such "reasonable time" must be within the limits set for completion of all administrative procedures, to-wit, September 1st.

[fol. 312] 3—Paragraph Eight provides in effect that when it is determined by the Board that a hearing will be had it shall be begun within twenty days and the parent of the child given only five days notice. The Court believes this notice should be at least ten days.

4—In Paragraph Nine it is provided that the Board may conduct hearings either before the Full Board or before not less than three of its members, or before one member or a competent examiner. It is further provided in Section 10 that the Board will notify the parents of a child of its decision "within ten days after the conclusion of the hearing". It is not clear whether said ten day period refers to a hearing before the full Board or the hearing before an examiner. It would seem that a ten days period would be insufficient for a hearing before an examiner, preparing a transcript of the evidence, report by the examiner to the Board, and decision thereon by the Board. Provisions should be made for a time limit for the filing by the examiner of his report to the Board and action by the Board on the same.

5—Paragraph Ten provides that exceptions to the decision of the Board may be filed within five days notice of the Board's decision and the Board shall meet within ten days to consider the same. This could require daily meetings of the Board. It would be acceptable to the Court that the language "the Board shall meet within ten days" is stricken [fol. 313] and the words "the Board shall meet promptly" be inserted. The time limit of September 1st would insure a sufficiently prompt action by the Board.

With the foregoing exceptions the Plan submitted by the Board is approved by the Court and all objections thereto are overruled. Defendants are directed on or before January 22, 1960 to file with this Court any amendments as aforesaid to the proposed Plan.

This the 18th day of January, 1960.

Frank A. Hooper, United States District Judge.

[fol. 314]

IN UNITED STATES DISTRICT COURT

RESPONSE OF DEFENDANTS TO PLAINTIFFS' MOTION FOR FURTHER RELIEF—Filed March 8, 1960

Response

Now come the defendants, pursuant to the Order of the Court entered February 26, 1960 and served on counsel for defendants February 29, 1960 and file this response to the motion of the plaintiffs for further relief and show:

1.

Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 simply recite portions of the history of the case and do not set forth other facts. Consequently they require no response.

2.

Responding to Paragraph 12 of the motion, defendants say that the General Assembly of Georgia did convene as

provided by the Constitution of Georgia on January 11, 1960, the same being the second Monday in January, remained in session for forty days as authorized by the Constitution of Georgia, and adjourned on February 19, 1960. Defendants say that at said session of the General Assembly, as will more fully hereinafter appear, the General Assembly of Georgia did adopt a resolution creating a "General Assembly Committee on Schools".

[fol. 315] 3.

Paragraph 13 of the motion for further relief is denied. Further answering said paragraph, defendants say that it is simply a restatement of the position of the plaintiffs on a matter upon which the Court has already ruled.

4.

Further responding to the motion of the plaintiffs for further relief, defendants say that immediately upon the entry of the order of the Court of January 20, 1960 approving the plan adopted by the defendants pursuant to the order and judgment of the Court in this case, defendants did, as provided by the plan, through their counsel transmit to the President of the Senate and the Speaker of the House of Representatives of the State of Georgia copies of the plan which, as authorized and directed by the Court, expressly provided that it should be "contingent upon the enactment of statutes by the General Assembly of Georgia permitting the same to be put into operation".

5.

Respondents further show that the General Assembly did, at its session of 1960, adopt a resolution creating the General Assembly Committee on Schools. A copy of said resolution is hereto attached, marked "Exhibit A" and made a part of this response.

[fol. 316] 6.

Said resolution requires that the Committee hold public hearings, at least one in each Congressional District, and make positive recommendations to the 1961 session of the General Assembly and such other and further recommendations as it may deem meet and proper. All such recommendations shall be made public not later than May 1, 1960, and the Committee shall stand abolished as of that day. Respondents show that the Committee consists of various persons who are made members of the Committee by virtue of their positions or offices, and two members of the Senate appointed by the President of the Senate and four members of the House of Representatives appointed by the Speaker of the House of Representatives. The Committee consists of the following members:

(1) Robert O. Arnold Covington, Georgia	Chairman of the Board of Regents of the University System of Georgia
(2) Samuel J. Boykin Carrollton, Georgia	President of the Association of Superior Court Judges of Georgia (Judge Boykin is Judge of the Superior Court of the Coweta Judicial Circuit)
(3) George B. Brooks Crawford, Georgia	A member of the House of Representatives appointed by the Speaker
(4) Harmon Caldwell Atlanta, Georgia	Chancellor of the University System of Georgia
(5) H. Eulond Clary Thomson, Georgia	Member of the State Senate appointed by the President of the Senate

[fol. 317]

(6) Charles A. Cowan Cartersville, Georgia	President of the Georgia Municipal Association
(7) Cohn W. Dent Cartersville, Georgia	President of the Georgia State Chamber of Commerce

(8) John P. Duncan Quitman, Georgia	President of the Georgia Farm Bureau
(9) John W. Greer Lakeland, Georgia	Member of the State Senate appointed by the President of the Senate
(10) J. Battle Hall Rome, Georgia	Chairman of the Education Committee of the House of Representatives
(11) Render Hill Greenville, Georgia	Member of the House of Representatives appointed by the Speaker of the House of Representatives
(12) Howell Hollis Columbus, Georgia	Member of the House of Representatvies appointed by the Speaker of the House of Representatives
(13) Wallace Jernigan Homerville, Georgia	Chairman of the Educational Matters Committee of the State Senate
(14) Zade Kennimer Waverlay Hall, Georgia	President of the Educational Cabinet of Georgia, representing the Georgia Education Association, the Georgia Association of School Administrators, the Georgia Association of School Board Members, and the Georgia Congress of Parents and Teachers
(15) J. W. Keyton Thomasville, Georgia	Chairman of the County Commissioners Association of Georgia
(16) H. W. Parker Sylvania, Georgia	Member of the House of Representatives appointed by the Speaker
(17) Claude Purcell Atlanta, Georgia	State School Superintendent of the State of Georgia

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(18) Homer Rankin Tifton, Georgia	President of the Georgia Press Association
(19) John A. Sibley Atlanta, Georgia	President of the Alumni Association of the University of Georgia

Mr. Sibley has been chosen Chairman of the Committee, Mr. Duncan Vice Chairman, and Senator Greer Secretary.

7.

Respondents show that the members of the Committee, some or all of whom may be known to the Court, are all reputable, high class citizens of the State of Georgia. Respondents have every reason to believe that they are approaching the problems presented by the Order of this Court and the plan adopted by respondents in good faith. The Committee is now engaged in conducting hearings and respondents say, on information and belief, that hearings will be conducted in every Congressional District of the State. Respondents believe that the work of the Committee will be completed as provided for by the resolution and its report submitted on or before May 1.

8.

Responding further to the motion for further relief, respondents say that although the General Assembly of Georgia has adjourned pursuant to the provision of the Constitution which limits its annual sessions to forty days, an extraordinary session of the General Assembly can be [fol. 319] called by the Governor at any appropriate time, and the fact that the General Assembly completed its 1960 regular session without taking action other than the adoption of the aforesaid resolution does not mean that no further consideration can be given to the matter during the current year. Respondents say that the plan which was adopted by respondents pursuant to the order of the Court was made contingent upon the enactment by the General Assembly of Georgia of statutes permitting it to be put into operation because the Court, in its findings of fact and

conclusions of law filed June 16, 1959, provided that the plan might be submitted subject to approval by the Georgia General Assembly and because respondents recognize, as the Court recognized by its findings of fact and conclusions of law, that they are dependent upon State law for funds with which to operate the schools. They say that it is not only true as suggested by the Court in the order of June 16, 1959 that State funds are necessary for the operation of the schools, but it is also true that the ability of the City of Atlanta to raise funds for the operation of the schools by local taxation is likewise dependent upon State laws, the City of Atlanta being a political subdivision of the State of Georgia.

9.

Respondents show that until the General Assembly Committee on Schools provided for by the resolution of the [fol. 320] General Assembly completes its hearings and makes its report and recommendations, it cannot be determined what action by the General Assembly will be recommended by the Committee, and until the General Assembly considers such recommendations, it cannot be determined what final action will be taken thereon by the General Assembly or what final action will be taken by the General Assembly upon the plan submitted to the Court and with the approval of the Court submitted to the General Assembly.

10.

Respondents further show that, having in good faith adopted the plan and submitted it to the Court for the Court's approval, and having in conformity with the order of the Court submitted the plan to the General Assembly, they have done all they can do towards putting the plan into actual operation. Respondents have no power to control the action of the General Assembly of Georgia, and no power to provide funds for the operation of the schools except in conformity with the laws of Georgia. They say that unless and until the Georgia General Assembly enacts statutes permitting the plan adopted by respondents to be

put into operation, it cannot be put into operation because funds to operate the schools under the plan will not be available.

[fol. 321] 11.

Respondents say to the Court that they believe that it is not in the public interest or in the best interest of the school children of the City of Atlanta, those of the white race and those of the Negro race, that further relief be granted to the plaintiffs at this time, or that further relief be granted until it is determined finally that the plan submitted by the respondents and approved by the Court will not be approved by the General Assembly of Georgia.

Defendants respectfully submit this response to the motion of the plaintiffs in conformity with the order of the Court.

B. D. Murphy, J. C. Savage, Newell Edenfield, Attorneys for Respondents.

Certificate of Service (omitted in printing).

[fol. 322]

EXHIBIT A TO RESPONSE

"Resolution Creating the General Assembly Committee on Schools" (omitted in printing).

[fol. 331]

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS APPEAL—Filed March 24, 1960

Come now the plaintiffs by their undersigned attorneys and move this court for an order pursuant to the provisions of Rule 73(a) of the Federal Rules of Civil Procedure, dismissing their appeal herein, and as grounds therefor show the following:

1) On March 9, 1960 this Court entered an order reserving decision on plaintiff's motion for further relief filed

in this cause on February 26, 1960 and setting a hearing thereon on May 9, 1960 before this Court.

2) On the same day, plaintiffs filed a notice of appeal from said order to the United States Court of Appeals for the Fifth Circuit and posted the required bond for costs.

3) Plaintiffs have not taken any further steps to perfect their appeal and the appeal has not been docketed in the said Court of Appeals.

Wherefore, plaintiffs pray that this Court enter an order dismissing their appeal.

E. E. Moore, Jr., Suite 201, 175 Auburn Avenue N.E., Atlanta, Georgia;

Constance Baker Motley, Thurgood Marshall, Suite 1790, 10 Columbus Circle, New York 19, N.Y.,

Attorneys for Plaintiffs.

Donald L. Hollowell, A. T. Walden, Of Counsel.

[fol. 332] Notice of Motion (omitted in printing).

[fol. 333]

IN UNITED STATES DISTRICT COURT

ORDER ON MOTION TO DISMISS APPEAL—March 24, 1960

Plaintiffs have filed with this Court a motion to dismiss the notice of appeal filed on March 9, 1960.

The said notice of appeal takes exception to an order of this Court of March 9, 1960 in which this Court denied the motion of plaintiffs filed February 26, 1960 seeking to obtain an order requiring the defendant Atlanta Board of Education to put into effect as of September 1960 the Plan of Operation of the Atlanta Schools therein referred to. Said order of March 9, 1960 reserved a decision on said motion, setting the same down for trial on May 9, 1960.

The Court is in doubt as to which orders and judgments of the Court are sought to be reviewed by the notice of appeal filed by plaintiffs on March 9, 1960, being the notice of appeal now sought to be withdrawn.

This Court assumes that said notice of appeal has reference to the Order and Judgment of this Court approving the Plan submitted by the defendant Atlanta Board of Education, and also has reference to the refusal by this Court to order said Plan put into operation in September 1960.

It would seem that the granting of this motion to dismiss appeal is within the discretion of this Court, pursuant to 1946 Amendment to Rule 73(a), Federal Rules of Civil Procedure, which provides as follows:

> [fol. 334] "If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant."

The appeal now sought to be dismissed has not been docketed, but although counsel for defendants have been given notice of this motion they have not expressly consented to the dismissal of the appeal.

This Court, in exercising its discretion as to the dismissal of said appeal, desires to remove any uncertainty as to the legal effect of such dismissal for the reason that any uncertainty or confusion therein will not be to the public interest.

Wherefore, It Is Ordered that plaintiffs not later than thirty days from and after this date, file with this Court an amendment to their motion to dismiss the appeal, setting forth each of the orders and judgments of this Court which were sought to be reviewed by the notice of appeal filed March 9, 1960, and reciting the legal effects which will follow the granting by this Court of said motion to dismiss the appeal, particularly designating which previous judgments and orders of this Court, if any, will still be subject to any future appeal after the appeal in question has been dismissed.

This the 24th day of March 1960.

Frank A. Hooper, United States District Judge.

[fol. 335]

IN UNITED STATES DISTRICT COURT

AMENDED MOTION TO DISMISS APPEAL—Filed April 2, 1960

Pursuant to the order of this Court entered on the 24th day of March 1960, plaintiffs amend their motion to dismiss to show the following:

1. By their notice of appeal filed in this cause on March 9, 1960 plaintiffs intended to appeal from the order of this Court entered on the same date "denying their motion for further relief" as stated in said notice of appeal.

2. Upon reconsideration and in the light of the fact that the court set May 9th, 1960 as the date for hearing plaintiffs' motion for further relief, plaintiffs decided to withdraw the appeal and to proceed with the hearing on May 9, 1960.

E. E. Moore, Jr., Suite 201, 175 Auburn Avenue N.E., Atlanta, Georgia;

Constance Baker Motley, Thurgood Marshall, Suite 1790, 10 Columbus Circle, New York 19, N.Y.,

Attorneys for Plaintiffs.

Donald L. Hollowell, A. T. Walden, Of Counsel.

(Certificate of Service)

[fol. 336]

IN UNITED STATES DISTRICT COURT

ORDER OF COURT—April 5, 1960

Plaintiffs' motion to dismiss appeal filed March 24, 1960 is hereby granted and the appeal is dismissed as prayed.
This the 5th day of April, 1960.

Frank A. Hooper, United States District Judge.

[fol. 337] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 6298

VIVIAN CALHOUN, et al,

vs.

A. C. LATIMER, et al.

Atlanta, Georgia.

Transcript of Hearing—July 5, 1962

Before Honorable Frank A. Hooper, Judge.

Appearances:

For Movants: Mrs. Constance Baker Motley, E. E. Moore, Jr., A. T. Walden, Donald L. Hollowell.

For Respondents: A. C. Latimer, William H. Major.

The Court: Parties ready to proceed in Calhoun against Latimer?

Mr. Latimer: We're ready, Your Honor.

[fol. 338] The Court: All right. I believe the Plaintiff is the one who made this motion, is it not, Mrs. Motley?

Mrs. Motley: Yes; it is, Your Honor.

The Court: All right.

Mrs. Motley: The Plaintiffs have made this motion for an order setting a day certain on which to hear the previously filed motion for further relief. I believe our motion was filed on April the 30th, and we filed that motion with a notice to the Defendants we would bring it on for hearing on the 28th of May, 1962; and then it was continued or set by the Court for hearing on June 28, 1962. Two days prior

to that time as I understand it, the Defendants filed with the Court an affidavit to the effect that Mr. Edenfield was ill and therefore the Defendants could not proceed with the hearing on the 28th of June. Now the Plaintiff's contention here is that in view of the fact that the Defendants are represented by other able counsel, it seems to us that Mr. Edenfield's illness is an insufficient reason for passing a case of this importance. Mr. Latimer is one of the attorneys for the Defendant. He was one of the Defendants himself when this case was brought; when it was tried; when it was decided; when the Court approved the plan. And I notice from the orders which we have received in this case that the Attorney General of the State is an attorney for the Defendants, and a Mr. J. C. Savage is also an attorney [fol. 339] for the Defendants.

The Court: Who was that?

Mrs. Motley: Savage. J. C. Savage.

The Court: Savage. Oh, yes; City Attorney.

Mrs. Motley: So that it seems to us that Mr. Edenfield's illness is not a sufficient reason to pass this matter, and that the case should be set for hearing on a day certain within thirty days from the date on which we filed this motion.

The Court: When this matter was first presented to me, I thought that it involved the present school year, 1962. I found out, however, that there was no effort to get any change in the transfer of the placement plan for the fall of '62. Therefore, I put it down immediately following a calendar which had already been set up of two weeks in Rome and two weeks in Atlanta; and the date of June 28th seemed to be agreeable to all parties. Now it is true, as you say, that about two days before that hearing, I was furnished with an affidavit by a Doctor Wilson indicating that Mr. Newell Edenfield had a very, very serious heart operation. You, I believe, were out of the city. I know it could not be heard on that date if Mr. Edenfield were the leading counsel. So I thought it would be better to promptly notify all parties that it was off rather than to have any parties to come here and make an unnecessary trip and [fol. 340] then have it taken off. I was assuming that Mr. Edenfield was in fact the leading counsel, and that being the

case, there would be no question that it could not be tried on June the 28th in view of his serious condition. Now I believe you say in your motion that Mr. Edenfield in your opinion is not the leading counsel and that brings up another question. And I would be glad to hear from Respondents as to whether the presence of Mr. Edenfield is or is not necessary. As a matter of fact, I believe briefs have been filed by both sides already, is that correct?

Mrs. Motley: Briefs?

Mr. Latimer: No.

Mrs. Motley: No, sir; Your Honor.

The Court: They have not.

Mrs. Motley: I would like to say this, Your Honor, if I may, in addition, that in our motion for further relief, we pointed out that the plan as approved by this Court was not being followed by the Defendants even as written. Now it is true that when I discussed the matter with you, I indicated that we did not expect by—by the filing of a motion at the end of April, that we could get a new plan into effect by September. I stated that, and I state now that I think a new plan could not go into effect until September, '63; but in addition to that, we have pointed out [fol. 341] that only nine students had been assigned to four high schools, I believe it is. The way we read the plan is that the Defendants were bound to reassign everybody in grades 11 and 12 pursuant to the criteria of the plan. Now September is coming up, and the question is whether everybody in grades 10, 11 and 12 are going to be reassigned pursuant to the plan or whether these criteria are only going to be applied to Negroes seeking transfers to white schools.

The Court: I may say it was never intended that there should be any difference in the criteria as between Negro or white people. If there's any clarification desired in that regard, I would be glad to make it, and I do not believe that there is any wording—

Mrs. Motley: Yes, sir.

The Court: —in there that would so indicate.

Mrs. Motley: That's right.

The Court: I think it says that any person desiring a transfer would be gauged by that—that standard. Now there's been a possible misconception of what happened in

the case of Miss Threlkeld, I believe it was, of Northside; a white girl. In that case, her motion to transfer was denied because it was not made pursuant to the plan. Her motion for transfer was made expressly and intentionally upon the sole ground that Negroes were admitted, and that's the [fol. 342] reason that her transfer was turned down. Any —any white child has the right to transfer from one school to another under the terms of the plan itself, and it is not made discriminatory on that.

Mrs. Motley: Yes. Well, with respect to the continuance of any child in a classroom, it's my understanding of the plan as approved that these criteria are likewise to be applied. In other words, the criteria are not to be applied simply to Negroes and whites seeking transfer, but that the criteria of the plan were to be the basis upon which everybody in classes 11 and 12 were assigned to school. Now what has happened in effect is that everybody has been reassigned on the basis of race in grades 11 and 12, and only those persons who seek transfer and those are mainly Negroes, are being subjected to the criteria of the plan. Now we say that this Circuit has already ruled on that. The Fifth Circuit had ruled on that before this plan was approved in the Manning Case, where they ruled that if pupil assignment criteria are used as a basis for assigning, that those criteria have to be applied to everybody.

The Court: I think that's good law. I would like to see that case. Do you have the citation there?

Mrs. Motley: I believe it is 277 Federal 2nd 730. I don't remember exactly.

The Court: 277 Federal 2nd.

[fol. 343] Mrs. Motley: It's Manning against the Public Board of Instruction.

The Court: Could you point out to me, Mrs. Motley, any language in the plan I have approved that would seem to you to be discriminatory?

Mrs. Motley: No; I say the plan is not discriminatory. I say they have not followed it, and I'll read the language which I think shows that. It's paragraph numbered one of the plan. It says, "In the assignment, transfer or continuance of pupils among and within or within the classroom and other facilities thereof, the following factors and the

effects or result thereof shall be considered." Now they haven't applied that in the assignment and continuance. They've applied these criteria only in the transfer.

The Court: Now here's something very vital. I construed your motion here not to be an exception to any clarification which the school authorities had made, but rather you were asking for a change in the plan itself. Now there's two very different things, and I think we should clarify that. There has been no appeal to this Court by any Negro claiming that a transfer was refused, and not in good faith. Not a single one. And if this is—if this is that type of a motion, then I have been under a different impression. And I—I would say that any Negro who claims that plan has not been carried out in good faith would have [fol. 344] a right to except and appeal to this Court. But no one has, so let's get it clear whether you are complaining of the—of the plan itself, or if you are complaining of the administration of the plan? I—

Mrs. Motley: Well,—excuse me, Your Honor.

The Court: Yes.

Mrs. Motley: Well, I'd like to make it clear, Your Honor, that we're complaining that the plan approved by this Court is not being followed. I believe we have those allegations in the motion, which I'll find at this moment.

The Court: Well, I would like for you to specify the incidents where you claim the plan has been—

Mrs. Motley: All right.

The Court: —not administered in good faith.

Mrs. Motley: Just a moment. If I can get the motion itself—may I borrow the Clerk's copy—

The Court: Yes.

Mrs. Motley: —Your Honor, of the original motion?

The Court: Yes.

Mrs. Motley: I believe it's beginning on Page 3, Paragraph 9: On September 13, 1960, this Court rendered an opinion on Plaintiff's motion setting forth its reasons for denying same with respect to the September, 1960, school year and granting same with respect to the September, 1961, school year. Thereafter, approximately nine Negro [fol. 345] children were assigned to the 11th or 12th grades in schools previously limited to attendance by white pupils

for the September, 1961, school year. Paragraph 11. All other 11th and 12th grade pupils and all other pupils were assigned to schools on the basis of race. And then we go on to discuss the nine Negro applicants who were allowed out of the approximately seventy-five Negro pupils who had applied for transfer, and so forth.

The Court: Now what is the date that those—all others were allegedly improperly denied the transfer? Would you give me the date of that?

Mrs. Motley: No, it's not transfer, Your Honor. Those who were denied transfer were the—well, it's seventy-five minus eleven, about sixty-four, who were not granted transfers of Negroes that applied. But Paragraph 11 says that all other 11th and 12th graders were assigned on the basis of race, whereas it is our contention that all of those students should have been assigned in accordance with the criteria of the plan and not on the basis of race. And then we say in Paragraph 13 that contrary to the Supreme Court's decision in Brown, Defendants have continued to maintain and operate a racially segregated school system in the City of Atlanta. What happens is, as we say here, that they've continued to maintain Negro and white schools, and what the Negro has here is a right to apply for ad-[fol. 346] mission to a white school, and we say that they can't maintain white schools or Negro schools.

The Court: Mrs. Motley, we are going back now and plowing over all the same ground that has heretofore been gone over. Let's take a thumbnail sketch of this case. First, the Plaintiffs in behalf of the Negroes contended that the schools of Atlanta were maintained on a discriminatory basis in regard to race. This Court at the hearing took judicial cognizance of the fact that that was true. I don't think there could be any—any question about that, that as—as of the time of hearing. Now no one appealed from the Court's ruling, and the Court ruled that it was being run on a discriminatory basis. Second, the question then arose as to a plan of transfer whereby the discrimination could be eliminated over a period of time which would try to satisfy the ends of the law and also to prevent any violence or any unfortunate incidents, and also to adapt

itself to a very drastic and revolutionary change of the setup in all of those Atlanta schools. Now all of that was thoroughly gone into at that time, and the plan adopted by the Court after hearing from all parties was adopted and the plan apparently was acceptable to all parties, because your group filed an appeal, and the appeal was dismissed. Therefore, we must assume that as of the time the plan was approved by this Court and put into effect, [fol. 347] it was a legally acceptable plan. If not, an appeal could have been conducted and not dismissed. Now if—if the school board authorities since that plan was adopted are administering the plan in an illegal way, if they are not transferring and assigning students on the basis of the requirements as laid down in that plan, then you and your group would have a good cause for complaint. Now you say that that is true. You say that it is not being administered according to the plan. I would think the proper procedure in that case would be when any Negro applied for admission or transfer to any school which had previously—had been white and was turned down, that there should be then immediately an administrative appeal on it as provided and an appeal to this Court. And I say again that during all this period of time no individual Negro has come before me and made the statement that "my assignment to a school" or "my transfer from one school to another was not made in good faith." Now I know from reading the newspapers that a great many have applied who were turned down. I also notice that a substantial number who applied have been granted. And I would therefore assume that since none of them have come before me and made the assertion that the denial of their applications were discriminatory, I must assume that their denials were in good faith. Now we know from reading the decisions and the newspapers that this has not hap- [fol. 348] pened in other jurisdictions. I know in Virginia, Judge Bryan had a large number appeal to him and among those numbers who were turned down, a large number were appealed to him. Some of those he ruled with and said they should have been admitted; and others he ruled and said should not have been admitted. But that hadn't hap-

pened in Atlanta at all, and I'm just wondering if you—if your attack here should not be a little bit more specific and not so broad and general. To say in a broad way the school authorities are not in good faith carrying out the plan, that that's shooting at somebody with a broad gauge shotgun. But to say on the other hand that John Doe or Richard Roe or Mary Smith or Sara Jones were unlawfully turned down, that's something that the Court could—could specifically try out and determine, and would be glad to do so if it were ever brought before me.

Mrs. Motley: Well, if Your Honor will recall, that case was never brought on the theory that John Doe applied for admission to School X and was denied to transfer from School Y because of reasons—the case you refer to in the Fourth Circuit, those people had applied for admission to a particular school, and the Fourth Circuit ruled that was required before they could bring any suit in the Federal District Court in that State. And the Fifth Circuit has consistently ruled that's not required in this Circuit, beginning with the Gibson case at Miami in 1956, and the [fol. 249] second Gibson case, and the Holland case and the Manning case and the Bush case. This Circuit has never required the plaintiffs to apply for admission to a particular school. Contrary to the Fourth Circuit, they have ruled that once you have petitioned the board to desegregate the schools and they refuse to do so, you are entitled to go into a Federal Court to enjoin the policy of operating the schools on the segregated basis. Now the Fourth Circuit has only recently come to that position in the Green case in Norfolk, and in the Marsh case in Norfolk County. That is the position of the Fifth Circuit with respect to these criteria. They have now required those school authorities which use these criteria to apply them to everybody and have permitted sort of broad class action, whereas before that didn't appear possible in the Fourth Circuit; so that we do not intend on this hearing for further relief or in any other to come under the proposition solely that the school board should have assigned A to School X, because that's not the kind of relief we ask. What we ask is an end to the policy of operating the schools on a segregated basis.

The Court: That's all been gone over, Mrs. Motley. The Court ruled that the schools were operated on a discriminatory basis and the question then involved was how should it be converted over from a discriminatory basis to a non-discriminatory basis. Now Mrs. Motley, if you will [fol. 350] go back and read the transcript of the hearing, at one point in there I asked you this question—and I will not attempt to use the exact language—but I said, "Mrs. Motley, do you contend that this conversion over to a non-discriminatory basis should be instantaneous, wholesale, and in all grades, and do you realize the unfortunate results that would follow," and you did not in answer to that question say, "Yes, we are asking that it be done wholesale and immediately." You did not take the position that it should be done in that way.

Mrs. Motley: We are still not taking that position. We—

The Court: We are all—

Mrs. Motley: Sorry.

The Court: We are all here trying to work out a plan whereby there would be deliberate speed, whereby it would be done as quickly as could reasonably be done, and that there should be sufficient deliberateness so as not to cause a—direful consequences. And I want to say that the attitude of the city authorities and the people of Atlanta and of both races in my opinion has been—has been magnificent; and the plan has been commended by the people in the press all over the country, and I had thought that things were in a very desirable status. Now I want to say this. If you have any proof that the plan is being unfairly administered, that Negroes are being turned down on dis- [fol. 351] criminatory bases, I will set that down and we'll have a full scale hearing on that point; but you'll have to be more specific than you have been. You will have to name instances in which discrimination is alleged to have been made. I don't believe the Board of Education could answer a broad charge that "You are discriminating." That—and if you—if you have—if you have evidence to show any instance of discrimination under all the rules of all the district courts in the United States by way of pretrial and definite statement, et cetera, every Defendant is entitled to

know the details of the charges and contentions made against him. Now if you'll do that, if you will—if you will elaborate, any incident of discrimination and file it with this Court, then I will—I will put that down for just as quick a hearing as it's possible to do it.

Mrs. Motley: Well, Your Honor, I don't know what we can say other than what we've already said in this motion, that all other 11th and 12th graders were assigned on the basis of race except the nine who were admitted to white schools, as we say here. The seventy-five others were denied admission. We also then say that contrary to the Brown decision, they've continued to maintain separate school systems, and on this hearing on the 28th of June, we expected—we subpoenaed the Superintendent of Schools, the Chairman of the Board, and the Supervisor of Negro [fol. 352] Schools. And we are quite prepared to show that everybody else was assigned on the basis of race in Grades 11 and 12. Now we don't conceive of this as a transfer plan. As I said initially, the way we understand the plan is that everybody in Grades 11 and 12 were to be reassigned on a non-racial basis, and we say that has not been done. What they have done is to permit Negroes to transfer to white schools and then to those Negroes they have applied the criteria of the plan, and we say that cannot be done; that this plan as written, if it were carried out, would have resulted in substantial desegregation in Grades 11 and 12. Well, they haven't done that, and that's not wholesale desegregation, and will not—

The Court: Well, let's—pardon me; I—I just want to make this observation. There's only two classes of students that apply to the Atlanta Public Schools for admission. First is a student who was in the public schools last year. Second is a pupil who comes in here that was not in the public schools last year. Now we do not start out with the assumption that every child in every school has got to be changed. If a child was in School A last year, he would presumptively stay in that same school unless he or she claimed that they should properly under the plan be in School B. In that event, they would apply for admission into School B, and would be entitled to be admitted in School

B if his or her residence and educational qualifications and [fol. 353] those things in there were correct. Now as to a new student coming in, moving in from out of the city, that would not be a question of transfer. It would be a question of—of which school they should go into to begin with and the same criteria would apply to that student. They would apply for admission to a particular school, and if qualified, and without any discrimination, he or she would be admitted to the school to which they applied. Now all of that must, of course, be done without discrimination, and it is all done, as I see it, in order to gradually eliminate the discrimination which you charged in your original case, and in which this Court found did exist. I don't know whether you and I are thinking in the same realm at all, or not. Now the plan which this Court approved and to which no appeal was made must be considered as being a valid plan as of the date it was made and ordered. And I say again, if you—if you claim these Respondents are not in good faith carrying out the plan, then you are entitled to be heard on it. But I still have not gotten from you a clear statement as to any colored person who has made an application pursuant to the plan and has been turned down unlawfully or not in good faith, and I think you ought to be able to name just one instance of bad faith.

Mrs. Motley: Well, we've got sixty-four, Your Honor.

The Court: Now, when did those—

[fol. 354] Mrs. Motley: We allege that seventy-five Negroes applied.

The Court: Now that's a broad statement. When did those sixty-four—

Mrs. Motley: In May, 1961, I think it was.

The Court: All right. That's a year ago.

Mrs. Motley: That's right.

The Court: All right, why did not any one of those sixty-four come into this Court and say that we were denied our rights?

Mrs. Motley: Because they have been exhausting that so-called administrative remedy provided under the plan.

The Court: All right. That's fourteen months ago, and the total overall time under that—under that plan was from May till September, which is five months.

Mrs. Motley: Well, we plan to show exactly what happened with respect to those sixty-four applications, Your Honor, on this hearing.

The Court: All right. Now that's exactly what I'm coming to.

Mrs. Motley: Yes, sir.

The Court: You have got the right to show that as to any one of those sixty-four who you claim were discriminated against. But that's not what you set up in this motion.

Mrs. Motley: We also plan to show that all of the students [fol. 355] in Grades 11 and 12 were assigned on the basis of race; and that number—I don't know the exact number, but it's certainly a great deal more than sixty-four or seventy-five in Grades 11 and 12 of the Atlanta Public School System.

The Court: Now here's what I'm trying to say to you, that the case you state now is not the case you have set up in this paper you have filed unless it is stated so broadly that I could not myself divine what you were contending; and I want to say this. You have a perfect right, if you'll be specific and come into this Court in behalf of any one single Negro who claims he is not being fairly treated under this plan, to a full hearing on it, and a decision by this Court as soon as it can—can possibly be made.

Mrs. Motley: Well, Judge Hooper, as I said a moment ago, we do not intend to get ourselves involved in the situation which has been the situation in the Fourth Circuit. We do not intend to come in here to have the Court pass on every Negro in the City of Atlanta or every white person. We don't think that's the function of the Court. And all we plan to show is that there has been continued discrimination, and what we plan to ask for is a reorganization of the school system on some non-racial basis, and that—the discontinuance of the policy of assignment of people on the basis of race and maintaining white schools as we prayed for in this motion. And we are not going to [fol. 356] come in here and say we should have been in School X, Y, Z and that's all we want. That is not what we want. We want everybody assigned on a non-racial basis.

The Court: Mrs. Motley, what you are saying in effect is this, that the Atlanta school authorities unfairly treated sixty-four, but you will not point out one of the sixty-four and prove that one was discriminated against. But you are going to make a package deal out of it. Here's what I'm trying to say to you. If sixty-four were—were ruled not eligible for transfer according to the plan, it would seem to me that you could prove that at least one of those sixty-four was entitled to transfer, and in bad faith were denied transfer. Unless you are attacking the plan in toto, which as I said a moment ago is something that's already been tried out and approved and to which no—no exception is made. Now I want to know whether you are trying to reopen the old case and try it over again.

Mrs. Motley: No, sir; as I understand it, the Court has retained jurisdiction of this case.

The Court: I retained jurisdiction to see that the plan as approved then by this Court was carried out in good faith, and I say again, if there is any one instance where the plan was not carried out in good faith, someone should come here and point out to me the name of one person who has been discriminated against. But you don't do that. You [fol. 357] say, "We will not point out one; we point out sixty-four." Now some have been transferred and found meritorious; and some have been found not. And I just don't know any way to approach this thing except to hear evidence on this issue as to whether any single Negro was denied illegally, and if you can't show that one was illegally denied, I don't see how you can show sixty-four were illegally denied.

Mrs. Motley: Well, I think the Court misunderstands me I didn't mean to suggest that we couldn't show that one had been denied illegally. What I intended to say is that we intend to show a pattern with respect to the sixty-four. Now as far as I'm concerned, and I would argue this on appeal, that the admission of nine Negroes in schools in Atlanta was not desegregation as we argued in the Memphis case, and as the Sixth Circuit ruled; that on its face says there has been no desegregation. Now all I'm going to do on this hearing is to show, as I say, that sixty—seventy-

five Negroes applied and of that number, nine were transferred.

The Court: All right.

Mrs. Motley: Standards were applied to them which were not applied to whites, and that the sixty-four denied admission were denied admission because they didn't meet certain aptitudes—aptitude tests, whereas there are whites in that school that didn't meet it either, but they are there; and that's what I mean by showing the case of these sixty-
[fol. 358] four. And then as I've said at least three or four times already, we will show that everybody else in Grades 11 and 12 had been assigned on the basis of race, and we construe that as contrary to the wording of this plan. Moreover, on the further relief point, in addition to showing that the plan has not been operating as was intended to operate, in our further relief matter, you know, that we allege that the teachers have been assigned on the basis of race, which is in our view clear evidence of the continuing policy of racial segregation in the public school system. And we intend to show that on this hearing.

The Court: Well, I'm frank to say that had you—had this matter been tried on the day it was set, June 28th, I would have gone into the hearing under a complete misapprehension of what you were claiming and I imagine that the Defendants would too. Now I won't try to speak for them, but I'll say that—that I had no idea that—that the contentions set out there are what you are making here today.

Mrs. Motley: Well, I think—excuse me, Your Honor.

The Court: I'll hear from the Defendants, and I'll say again that I will put this matter down—I could put it down almost immediately, if parties are ready on all the issues, and if Mr. Edenfield's severe sickness does not—does not prevent it, and I've got to hear from the Defendants as to who is the leading Counsel in the case.

[fol. 359] Mr. Latimer: May it please the Court, on the question of as to who is leading Counsel, I will state in my place that I do not know that any positive designation was made except that when Mr. Edenfield became ill and had to be operated on, I went to Mr. Savage—

Mrs. Motley: Excuse me. Your Honor, I can't hear Mr. Latimer. If he could stand over here, please, I may be able to hear him.

Mr. Latimer: I will speak a little louder. I rather stand here, if you don't mind. I went to Mr. Savage, who is the City Attorney, and asked him about the—who should try this case on June the 28th. Mr. Savage, who is my employer as far as being associated with the City Attorney is concerned, advised me that it was Mr. Edenfield's case; that he had been—tried the case before; that it was a matter of importance to the City and the school people, and that he wanted Mr. Edenfield to try it; and if he was unable to do so on the 28th of June, that I should seek a continuance of this case, based on the fact that Mr. Edenfield was unable to appear. Now I came over, if Your Honor will recall it, at a recess in which you were trying a libel suit, and reported to the Court that it had come to my attention Mr. Edenfield was sick, which I had knowledge of for some days but that I did not know the extent of his illness, because there had been a second operation performed, and that [fol. 360] it was my opinion, based on conversations which I had had with his office, and they in turn had been in contact with his doctors, that he would be unable to try this case on the 28th of June, and I said, "I have reported that to Your Honor." And you suggested that I formalize what I had reported orally and obtain an affidavit from the doctor. That took several days to do, and in the meantime, I state in my place that I called Mr. E. E. Moore, if I called him once I've called him ten times, in order to report to him what I was doing. I did not think it was necessary to call Mrs. Motley in New York. But I reported constantly what—or tried to report constantly to Mr. Moore. Last Tuesday a week back, I was at a meeting in which Mr. Moore appeared, and I asked the former president of the local chapter of the NAACP if he could get Mr. Moore to consult with me; I had something of importance to tell him. I got with Mr. Moore and informed him that the case would not be heard on the 28th if our motion was—for continuance were granted by the Court, and that the Court had indicated it would be granted. Now nothing has been done insofar as I am concerned to delay this action. I have done

everything I know how to do by seeking conferences and trying to communicate with Mr. Moore to advise him of the situation.

Now Mr. Edenfield is the leading Counsel in this case. He is unable to try this case until sometime after August [fol. 361] the 1st.

Now, Your Honor, as to the merits of this case, I'm not prepared today to argue them except to say this. I don't know of a people or community or city or a school administration that has in better faith tried to follow in spirit as well as in fact the letter and the spirit of the order of this Court, and to just broadside charge that we are still carrying on—that is, the Atlanta Public School System is still carrying on a bi-racial system in defiance of this Court order is too broad, and we are prepared and will meet when this matter is heard, to show the Court that in —even in details such as the school directory, we've deleted all reference to white teachers, Negro teachers, white schools, Negro schools in such matters that come before the Board. There's not any reference to this being a white school or this being a Negro school. Now where the Plaintiffs get that idea, I don't know. It may be from a local paper where they refer to a white school or a Negro school. That is not State action. That is not the action of the Atlanta School Board.

But I would say, Your Honor, without taking up any more time, that Mr. Edenfield is leading Counsel in this case, and the—if the Court sees fit to put us on trial, why I'll handle the matter and do it to the best of my ability. But that is the situation.

[fol. 362] The Court: Mr. Latimer, I would say that you or Mr. Edenfield would—would be the leading Counsel. Certainly it would be between the two of you, would it not?

Mr. Latimer: Yes, sir.

The Court: You have been president of the Board of Education; you have been in this case ever since it started.

Mr. Latimer: As a party till—

The Court: As a party and also as Counsel.

Mr. Latimer: Yes, sir.

The Court: Now you have retired from the Board of Education, and you are now a lawyer in the case.

Mr. Latimer: Yes, sir.

The Court: Would you—would you state in your place what issues you contemplated were to be heard on this case on June the 28th?

Mr. Latimer: Well, Your Honor, it's pretty much in that motion. The motion as I read it and as filed is—not the motion for continuance, but motion for further relief that we assign the teachers, principals and other professional school personnel on the basis of race and color; and they complain we have continued to designate schools as Negro and white, and meticulously we've tried to avoid that. It complains about racially segregated extra-curricular school activities, and they complain about continuing to maintain a dual school system, and area attendance lines and such. [fol. 363] Now they go on on their motion to give more or less a history of this case, but in no instance as I have read their motion do they charge that Tom Jones or Mary Doe, Negro or white, have been discriminated against and—or that their constitutional rights have been impaired. Now our idea of how to meet this was just on a factual situation; that in no instance have we knowingly or intentionally discriminated against any of the Plaintiffs in this case or any other Negro child in the system. Now the reason I say Your Honor, and want to bear down on this, that we were to—going to try to meet this on a factual situation is simply what has already been pointed out by the Court in terms much better than I could state it, that insofar as this Court approved plan is concerned, that was unappealed from by both parties, and it would seem to me to be the law of this case now certainly, that they or any other plaintiffs in an equity case such as this where the Court retains jurisdiction, can come back in and make a proper motion for further relief and say, "Now this plan is not being followed. It's been violated." But it would seem to me that they should say, "It's been violated in the following particulars," and that does give the school people a little something better to shoot at. But to answer your question, Your Honor, and quit rambling, my thought was to meet it on the basis of a factual situation to show that we have not discriminated and we are not practicing segregation [fol. 364] in the City of Atlanta.

The Court: Now Mr. Latimer, I can say that this Court has never purposely delayed any of these hearings since the original case was filed, and the Plaintiffs were given rather prompt action, and discrimination was outlawed in this case before a lot of cases pending in other "cases" were ever gotten to a trial. I think—I don't think anybody can say that there's ever been any disposition in any of these cases by this Court to delay it. I'm going to have to put a little burden on you as one of the lawyers in this case, in view of Mr. Edenfield's severe sickness, to acquaint yourself with these issues and maybe to see that this case moves along even during Mr. Edenfield's sickness. I would not rush the parties in the trial of the case with one—when one lawyer is severely ill,—I'm afraid he is severely ill,—I certainly trust it's not anything critical—and throw the trial on another lawyer when the lawyer says that he has not so actively participated in it in the recent stages that he can safely go to trial. So I'm going to have to do everything possible to clarify these issues and let both sides get the evidence and bring this case to as early a decision as possible to do so. Now in all frankness, I must say that if in the summer of 1961, as stated, a large number of Negroes were illegally turned down, I still think that Plaintiffs themselves could have moved with a great deal more dispatch; [fol. 365] could have complained of the denial of these sixty-four over a year ago and brought it to the attention of this Court and not wait fourteen months or so,—

Mr. Latimer: Your Honor, may I interrupt there?

The Court: —to do so.

Mr. Latimer: We have—the Atlanta Board of Education some, I think many months ago, and best of my recollection sometime back in 1961, made a motion and passed it as a part of the official record that they were ready, willing and able to hear the appeal of these persons denied transfer by the superintendent, and that Counsel for the Plaintiffs, the Negro Plaintiffs and for the Board of Education were to get together and set a time and place convenient to both of them, and the Board would meet and hear it, and preferably on Saturday, because they are business people, and that would not take up a business day. And that's been communicated with Mr. Moore, and there's an implication

here we've put this thing off and dragged our feet. You may recall, Your Honor, from reading the paper, the sixty-odd who were denied transfer appealed their case to the State Board of Education. The State Board of Education sent it back to the Atlanta Board of Education saying, "You haven't given us enough information of why you denied the transfer, so that we could intelligently make a decision. Therefore, we urge that you give the reasons for [fol. 366] the denial." I think they acted properly. Now in each one of those instances, they took each file as an individual situation and gave that applicant the reason his or her transfer application was denied. Now the next step under your plan was for the Plaintiff to appeal the decision of the superintendent denying the transfer to the Board, and from the Board to the State Board of Education, as provided by law, and then to this Court; and I'll say this, that the Atlanta Board of Education has been ready, willing and able to do that, for the past eighteen months.

Now Judge Hooper, if I may make a little personal reference here. I have tried for the Atlanta School System more cases this year than have been tried I would say in the last ten years; condemnation cases; cases in South Georgia; cases in this Court and everywhere else. I was on my vacation and came back for this motion this morning. I have many other things involving the City and my own private practice I will have to do between now and the rest of the summer. But if it's to the interest of justice and if this Court wants to do it, I'll take the case over and will try it any day the Judge puts it down. My personal "druthers" or my personal preference is that Mr. Edenfield, having been leading Counsel in this matter since January, 68, and this is now July the 5th, if no rights will be prejudiced in the meantime, that if we could try it sometime in [fol. 367] early August, that would be my preference.

The Court: Well, here's what I'm anxious to do, and had these Plaintiffs moved sooner, there wouldn't have been any problem. I'm anxious to hear the question fully on all matters of law and fact, and make a ruling so that the Movants, if I should rule against them, or the School Board if I rule against them, either way, would have an opportunity to go to the Fifth Circuit Court of Appeals

and get a ruling on it before May, 1963. Now it seems quite clear to me that this matter was not brought with a view of any change in the general policies as of the coming fall term. That's very clear because it was—it was not brought until the time for the applications for the fall of '62 to be filed and passed on. All that's been done. It is—it is important for the Plaintiffs to get a ruling from this Court in ample time for either side to appeal to the Court of Appeals and have that appeal decided by the time that transfers will be filed or applications will be filed for the session opening September, 1963.

Mr. Latimer: Yes, sir. And Your Honor, there's ample time as you know to get that appeal entered and approved and heard before May 1—May 15th of 1963. I mean, I can't see where, between now and the first week or so of August that that would be any fatal length of time insofar as an appeal is concerned.

[fol. 368] The Court: Well, now, I'm going to suggest this to you, since there's a great deal of confusion here, at least in my own mind about the issues that were to be tried, that you immediately propound interrogatories to the Plaintiff on the questions brought out here this morning, and I'll take the transcript of this hearing today as to Plaintiffs' contentions as to which you need not propound any further interrogatories; but if there is any question in your mind as to any—any specifics, I think you would be entitled to be apprised as to what type of evidence you are to meet; and as soon as the issues here can be clarified and the parties have an opportunity to meet it, a hearing—I'll put this down for a hearing as soon as I'm so advised. And if there should be any dragging of feet, of course, I would have to do it sooner than that. But I say again, I don't want to keep repeating this, but I say again that what seems very vital to me is, were any of these sixty-four who were turned down last year, a year ago, unlawfully turned down. Now—

Mr. Latimer: Your Honor, may I interrupt?

The Court: —you take—

Mr. Latimer: Only thirty-five or thirty-eight—

Mr. Moore: Eight.

Mr. Latimer: —appealed to the State School Board. She keeps talking about Seventy-five. Now of those, and

I'm quoting this from memory now and I could be in error, [fol. 369] but this is substantially correct; approximately half of those have already graduated and it would certainly be moot as to them. You see, the first year, Your Honor, was twelve and eleven, but because of the rulings of this Court, delayed it until such time as the Sibley Commission and also the Legislature could act one way or the other; we took two steps, two grades the first year, if you'll recall twelve and eleven. Now a substantial number of those children were twelfth graders and have graduated, you see. So you've got a moot question as to approximately half of your thirty-odd, and—

The Court: And the rest of them will be graduated by the end of this coming year.

Mr. Latimer: Yes, sir; by '63, if they pass the grades and passed all their tests, and if so, you have got the whole thing washed out.

The Court: Well, that shows the importance of applying to this Court immediately when turned down.

Mr. Latimer: Yes, sir.

The Court: If they were turned down in the summer of 1962 and immediately appealed to this Court, and if the Court found that they were illegally turned down, they would—they could have been admitted at this time.

Mr. Latimer: Yes, sir.

The Court: I think there's been some delay here in— [fol. 370] in moving in behalf of these individuals.

Mr. Latimer: Your Honor, I'll do whatever the Court wants me to. As I say, I would very much prefer, as would the City Attorney, that Mr. Edenfield be allowed to continue as chief, or in chief, in the trial of this case, having done it since '58; but if there are any rights involved that—any matters that are urgent, any rights that would be cut off by a delay, why I'll undertake to do whatever is necessary.

The Court: Well, I'm going to ask that you, and with the assistance of the Attorney General, Mr. Cook—

Mr. Latimer: He's not in this case, Your Honor.

The Court: He's not?

Mr. Latimer: I don't know how his name got on there, but Mr. Cook has meticulously stayed out of this matter, and is not a party to it, and how his name got on this notice

I don't know. Possibly the only thing I could think of is that the records now show that because of the Melkild case. That's the child—

The Court: Yes, sir.

Mr. Latimer: —at Northside that the Atlanta Board denied her application for transfer because it was based on the question of race. He was a party to that cause, but that came in collaterally and has nothing to do with the main issues here. So Mr. Cook is not involved in this case.

The Court: Well, do you feel from your knowledge of [fol. 371] the case that you have sufficient evidence to proceed if this matter should be put down for a very early hearing?

Mr. Latimer: Yes, sir; I'm familiar with it as the palm of my hand. I haven't handled the legal end of it from '58 to '61. I was a party as the President of the Board of Education, and since that time have been involved in the case. But Mr. Edenfield went on and continued as leading Counsel, and I've assisted him with the facts any way I could.

The Court: Well, what do you feel would be the earliest date at which you could go to trial?

Mr. Latimer: Well, as I say, I was on my vacation. I can cut that out, but I would like to have a couple or three weeks.

The Court: How much?

Mr. Latimer: Two or three weeks.

The Court: Well, I think that's a reasonable time.

Mr. Latimer: And Judge, two or three weeks, that's about the time Mr. Edenfield will be back.

The Court: I'd like for you to finish your vacation, but that may—

Mr. Latimer: I didn't have one for twelve years, Your Honor, so I'm sort of used to not having them, but—

The Court: Mr. Latimer, is it your information that Mr. Edenfield will be available by August 1st?

[fol. 372] Mr. Latimer: The doctor's affidavit as I recall it, Your Honor, says, the last paragraph, that Doctor Wilson said, "It is the opinion of the deponent that by reason of the aforesaid surgical procedures the said Newell Edenfield

will be physically unable to make any court appearances until sometime after August 1st," which I assume would be August 2, 3, 4 or anywhere along that line. Now Mr. Edenfield is at home, but he's been told to remain in bed, as I understand it, for the next couple of weeks except to get up around the house.

The Court: Well, I do not see how there would be any harm done to anyone by putting this down the early part of August. It certainly would allow ample time for a decision and an appeal before the next school year. And I say again, that the motion could have been made any time from September, 1962, up until the time it was made about May, 1963, or April 30, 1963. So I do not think that anyone will be hurt by putting it down. I'll put it down on Thursday —I'll just tentatively inquire if Thursday, August the 2nd, would suit your convenience, and—you and your associates, Mrs. Motley?

Mrs. Motley: Yes, it will, Your Honor.

The Court: I don't know of any conflicts at this time. I'll put it down for that date and check up and see if there are any conflicts. I'll say this Court has not planned [fol. 373] for any vacation, but that isn't so important. I'll put it down tentatively as of that date, August the 2nd, on Thursday.

Close the Court until further order.

(Whereupon, Court was closed at 10:40 a.m.)

End of Transcript

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 374] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 6298

VIVIAN CALHOUN, et al.,

vs.

A. C. LATIMER, et al.

TRANSCRIPT OF HEARING—December 14, 1959

Atlanta, Georgia

Before: Honorable Frank A. Hooper, Judge.

APPEARANCES:

For Plaintiff: Mrs. Constance Baker Motley, E. E. Moore, Jr., A. T. Walden.

For Defendant: B. D. Murphy, Newell Edenfield.

[fol. 375] The Court: You may proceed for the Plaintiff. I suppose Counsel are somewhat in doubt as to which side should first proceed. I suppose the first thing to take up would be the objections offered by the Plaintiffs to the plan which has been filed by the Defendants. Is that correct?

Mrs. Motley: Well, we had assumed, Your Honor, that the Defendant would proceed and support their plan, and then we would present our objections.

The Court: I will ask the Defendants if they wish to file anything further. They have filed a plan, and I will ask the Defendants if they would like to make any further statement?

Mr. Murphy: Not at this time, Your Honor. We have filed our plan in accordance with the order of the Court and we think in conformity with the order of the Court.

The Court: Very well. I will hear the objections by the Plaintiffs to the plan which has been filed.

Mrs. Motley: May it please the Court, we have filed our objections to the plan in writing, and I believe that they arrived sometime on Saturday, and I don't know whether the Court has had an opportunity to read our objections and a brief which we filed in support thereof. And along with our plan, Your Honor, we also furnished the Court a copy of the opinion of the Fifth Circuit in the case of [fol. 376] Gibson against The Board of Public Instruction of Dade County, which we think bears upon this case. The reason we furnished a copy is because we had not been able to find that that case had been reported; and so we undertook to have a copy of it reproduced and furnished to the Court and Counsel for the Defendants. Now our first objection to the plan, Your Honor, is that the plan is incomplete in that it does not comply with the order of this Court. As we understood the order of this Court, the Court not only enjoined the Defendants from discriminating against Negro students with respect to admission to a particular school, but also enjoined the Defendants from continuing to operate the school system on a racially segregated basis. We feel that the plan which has been submitted deals only with the first aspect which I referred to, and that is the assignment of pupils. There has been no plan presented which attempts to deal with the designation of certain schools as Negro and White; the assignment of teachers, principals and other school personnel; or the operation of many parts of the school program on a wholly segregated basis. Your Honor may recall the minutes which we introduced on the trial of this case which show for example that there is a national science program in which the high schools were participating which was operated on a segregated basis. That there were other features of the school program itself which were operated on a [fol. 377] wholly segregated basis. And the plan makes no attempt to deal with this. The plan simply provides the criteria whereby students may seek initial assignment or transfer between schools. Our second objection to the plan is that it avoids the duty imposed by the Defendants to desegregate. At the trial of this case, we emphasized to

the Court the decision of the United States Supreme Court in the case of Cooper against Aaron, in which the Court reviewed again its holding in the Brown Case, particularly its holding of 1955 with respect to its instruction to the lower Federal Courts in these cases, and pointed out that as a result of those decisions, State authorities were under a duty to initiate desegregation and to bring about full compliance with that decision. Accordingly in the Gibson Case to which I referred a moment ago, the Fifth Circuit there has likewise held that as a result of its decision in the first Gibson Case, school authorities had a primary and positive duty to comply with the May 17, 1954, decision of the Supreme Court. But the plan which has been presented here doesn't require the Defendants to do anything. The status quo is maintained and again any negro who would like to escape the segregated school may come forward and try to transfer to a white school. And this we say does not meet the requirements of the Supreme Court's decision of May 17, 1954, to desegregate the public schools. Now our third objection to the plan is that the inherent delays em- [fol. 378] bodied in this plan make a prompt and reasonable start impossible. In the Supreme Court's decision of 1955, the Court pointed out that the Federal District Courts may take into consideration the personal and public interest involved in any particular case. Despite this, however, they said that the Federal District Courts must nevertheless require a prompt and reasonable start toward desegregation. Now the plan as we see it makes a prompt and reasonable start impossible. It undertakes to establish a number of criteria for the admission of children to school now as against a very simple criteria which is presently in existence. The only criteria as we understand it now according to testimony on the trial was proximity to the school. And in some cases, transfers at the request of parents were granted. Now as against that very simple criteria for admission to the schools, we now have this plan which embodies at least twenty-four criteria as I see it, many of which are vague and indefinite, and at least two of which are unconstitutional on their face.

The Court: Which two is that?

Mrs. Motley: That is the one that has to do with breaches of the peace—the first one is the possibility of threat of

friction or disorder among pupils or others; the second is the possibility of breaches of the peace or ill will or economic retaliation within the community.

[fol. 379] The Court: I would like to ask, Mrs. Motley, whether those two features there were or were not included in the Alabama law?

Mrs. Motley: Yes, sir, they were included in the law.

The Court: And were they not approved by the Supreme Court?

Mrs. Motley: No, sir. As I understand Judge Rives' opinion in the Gibson Case, he points out that he did not pass on any parts or sections of the Alabama law separately; that he passed on the law as a whole as against the challenge that the law as a whole on its face discriminated against negroes. And he said that obviously the law as a whole on its face did not discriminate against negroes.

The Court: Outside of those two features, there is—you think there are no other requirements in the Alabama law which would be unconstitutional?

Mrs. Motley: Yes, I think the others—there are six others which I think are unconstitutional as a denial of due process and those are set forth in our brief on page twelve. I think that the Fifth Circuit has already passed upon this in the Bush Case. This case has been there a number of times but I think on this appeal of the Bush Case there was involved the Louisiana Pupil Assignment Law which established no standards whatsoever for the assignment of pupils to particular schools. And in that case the Fifth Circuit said [fol. 380] this: Attempts by statute to give any official the power to assign students to school arbitrarily according to whim or caprice are legally impermissible, especially if considered in light of the history of assignments made in a manner that has now been held to be unconstitutional and of the recently readopted requirement of the State Constitution reaffirming such unconstitutional standards which is reenforced by the heavy sanctions against any official permitting a departure therefrom contained in a companion statute. Now there they have made clear that statutes which are vague and indefinite and therefore permit of an assignment according to whim or caprice would be unconstitutional, especially in a case of this kind where the assign-

ments were previously made on a nonconstitutional basis or a basis now declared to be unconstitutional. And I think that this is well established in our law. I refer in our briefs to the case of Yick Wo against Hopkins where the Supreme Court there pointed out that no right can be made dependent upon the mere whim or caprice of a state official.

The Court: Now I would be glad if you would point out the provisions in the plan which you say are too vague.

Mrs. Motley: Yes, sir, I'll do that. Now the first one is the psychological qualifications of the student for the type of teaching and associations involved. The second is the psychological effect upon the pupil of attendance at [fol. 381] particular schools—at a particular school. The third is the home environment of the pupil. Fourth, the maintenance or severance of established social and psychological relationships with other pupils and with teachers. And fifth, the ability to accept or conform to new and different educational environment. And sixth, the morals, conducts, health and personal standards of the pupil. Now all of these attempts, which involve psychological considerations, are far too nebulous to be objectively determined, and it's clear that these criteria are all subject to varying interpretations as to what psychological effect the admission of a child to a particular school would have. That's wholly within the area of speculation. I don't think anyone could determine what effect psychologically admission would have on a child. Sometimes you may think that the child will be adversely affected psychologically; and on the other hand the child may not be because psychological factors are too difficult to weigh and determine and it's impossible to determine in any situation what a psychological effect will be on a particular individual.

The Court: Let me ask you two questions on that. First, whether or not the District Court Judge Bryan in Virginia in a certain case did not deal with those factors regarding a large number of individual students? And whether he did not review the action of the school authorities and admit [fol. 382] some and reject some? And whether or not that determination was not carried up and reviewed by a Circuit Court of Appeals? And whether or not in that case there was any contention made that the tests therein laid down

were illegal? If I am not in error, they were tried on the basis of whether or not his individual judgment on these negro children were supported by the evidence and not whether the tests themselves were invalid. Could you throw any light on that?

Mrs. Motley: I'm afraid I don't know which particular case Your Honor refers to. There have been a number in the Fourth Circuit and I haven't participated directly in those cases. And I therefore am not familiar with exactly which one you refer to. If you could call the City—

The Court: Maybe you could review that a little later and give me your views on it.

Mrs. Motley: Now on this—

The Court: There's another question I would like to ask you and that is, I am not a psychologist in any sense of the word and I don't believe that I know myself what would be the importance of those psychological factors and I don't know if I'll be aided by any expert testimony from either side or by any persons who are experienced in the operation of schools to give me any help on those questions.

Mrs. Motley: Well, we don't have any expert testimony [fol. 383] on those, Your Honor, and it seems to me we would not be able to get a psychologist to tell us now what effect admission of a child by the name of Brown to a school would have psychologically. I think he would be speculating on what the effect psychologically would be, even if we put him on the stand.

The Court: It looks to me like that matter has been under study by experts ever since the Brown Case came out in 1954 and by now someone ought to be in position to express opinions on whether those tests are reasonable or unreasonable by this time.

Mrs. Motley: Well it seems to me that what the Supreme Court was really saying in the Brown Case which took note of this evidence of the psychologists as to the psychological effects on negro children of a state who holds to segregation. What they were really saying that everybody knows that segregation is designed to stamp negroes with a badge of inferiority. And that this kind of injury the State could not inflict even if we didn't have the psychological tests to support it. So that I don't know whether anyone has since

that time tried to develop any psychological reasons or basis for saying that children should or should not be admitted to schools because I think the real point there was, this was an injury which the State could not inflict; this badge of inferiority; and I don't know that there is anyone [fol. 384] who can say now, that that is such and such a case or the psychological effects on the admission of negroes and whites could be validly obtained.

The Court: I believe that in a great many white schools or white school systems that there have been provisions for having separate schools for certain groups; but I'm not very familiar with it. I received these objections. As a matter of fact I didn't get them until sometime on Saturday and I have been in Rome several weeks and this matter here, I'm almost starting at the beginning this morning because I didn't get the objections filed as I say until last Saturday. All right, I'll be glad to hear any further objections.

Mrs. Motley: Now I think the same objection applies to this consideration of home environment. That's much too vague. One cannot say now what factors the school administrator would take into consideration; whether he would take into consideration the environment immediately outside the home or the environment within the home; whether he would take into consideration whether it was a slum area or a prosperous residential area or whether there were religious influences in the home or nonreligious influences. This kind of standard permits of arbitrary action and permits of mere prejudice or caprice to be the basis upon which admission or non-admission to a particular [fol. 385] school is given. And particularly when we consider the kind of situation which these tests are going to be applied, I think that the Court in approving any plan should approve a plan which will prevent a recurrence of the discriminatory action which the Court's order seeks to enjoin. I think if these kinds of standards remain in there, then the order would not actually enjoin the discriminatory action which is the objective of the order. Now with respect to number six, the morals, conduct, health and personal standards of the pupil. Of course, those are rele-

vant in determining whether a child should be admitted to school at all. Of course a child who is seriously ill or who has a contagious disease may be barred from the public schools; but these standards are not relevant to determining whether a negro child should transfer from a negro school to a white school because if a negro child's morals, conduct, health and personal standards are such that he can go to a negro school, then I don't see any basis for excluding him from a white school on these considerations. So that these particular considerations I think can only operate with respect to an initial determination as to whether a child shall be admitted to school at all and would not be relevant to a determination of whether a child should transfer from a negro school to a white school.

The Court: Now I would like to ask you if those elements were contained also in the Alabama statute?

[fol. 386] Mrs. Motley: Yes, sir; all of the criteria which have been adopted here as I see it have been taken word for word from the Alabama statute. And—

The Court: Well, do you not think that the Supreme Court in upholding the Alabama statute implied all the way through that these tests would be applied in a non-discriminatory way?

Mrs. Motley: No. I think that when the Supreme Court affirmed Judge Rives' decision in the Alabama Case they were careful to point out that it was affirmed on the narrow basis on which the statute was upheld by the District Court, and that was that the statute as a whole, on its face, did not discriminate against negroes. They did not pass upon the validity of any individual tests. There was—that is the thing that I think Judge Rives tries to clarify by his opinion in the Gibson Case. There has been this mistaken view, I guess, that the Supreme Court and Judge Rives approved every standard in the Alabama statute and therefore these standards may be adopted by other communities as a basis for assigning pupils to school. And I think Judge Rives wanted to correct that erroneous impression when he pointed out that he did not pass individually or separately on any parts of the Alabama placement act. He pointed out that the way that that came up, it came up on that very narrow point. There was no record

there which tended to sustain discrimination as alleged by [fol. 387] anything except the statute on its face. He pointed out that the Plaintiffs in that case offered no evidence whatsoever of the operation of the school system on a racially segregated basis. Now this case does not come up that way. This case has been through a trial here on the merits and there's all kind of evidence in the record that the system here is operated on a completely segregated basis. What you really have is a dual school system; a white school system and a negro school system. And assignments are made wholly on the basis of race, and this discrimination has occurred a long time. So that this case is in a completely different posture from the Alabama case when it came up.

The Court: I don't think your distinction is well founded. You say there is evidence here that the Atlanta schools have been operated on a discriminatory basis. That is true. I have already held that; but we are discussing a plan to eliminate the discriminatory basis, and to permit very select elimination of that. Don't you think there's a difference there?

Mrs. Motley: Well, I think that these criteria, the six which I have called vague and indefinite, have to be viewed against the record in this case as to whether the inclusion of these criteria will permit a continuance of discrimination on account of race; and I think that because these standards are so vague that discrimination on account of [fol. 388] race is permitted under these criteria, and that's why they are objectionable as against the record in this case. Now going on the fourth objection which we have to the plan here, and that is that the Defendants have not sustained their burden of showing that once the start has been made toward full compliance additional time is necessary. Now the Supreme Court in the Brown Case of 1955 said that the District Courts may take into consideration certain problems related to administration. But nevertheless, the Courts would have to require prompt and reasonable start toward full compliance and the Court pointed out that where a school board asked for time, the burden was on the board to establish that time is necessary in relation to the problems enumerated by the Court there, prob-

lems which relate to administration, the physical condition of the school plant, personnel, provision of school zone lines into compact units to establish a basis for determining admission to schools without regard to race. And those considerations, and nowhere is the need for twelve years spelled out here with relation to those considerations. They simply say that the plan shall proceed a grade a year without any justification of law for such a protracted length of time in bringing about full compliance with the Supreme Court's decision.

The Court: I have—I have read in the newspapers that this plan was patterned after Charlotte. Has the Charlotte [fol. 389] plan ever been attacked in the Courts on that ground?

Mrs. Motley: I don't know Charlotte, Your Honor. As I understand—if you are referring to Charlotte, North Carolina—

The Court: Right.

Mrs. Motley: As I understand it there, there is no twelve year plan involved. They have a pupil assignment plan which is different from the one here. The—I think there are only three or four criteria which are the bases for assignment there and I don't understand that there's any twelve years involved in the Charlotte, North Carolina, situation.

The Court: Well didn't the Charlotte plan start at the high school level and then go down, or not?

Mrs. Motley: No sir, I don't understand that.

The Court: I'm not familiar—

Mrs. Motley: Maybe you are referring to the Nashville plan, Your Honor, which starts in the first grade.

The Court: No, I am not. I would like to have the Charlotte plan explained to me and compared and see whether the Charlotte plan has or has not been approved by any Courts or not.

Mrs. Motley: Well there have been a number of cases in North Carolina which came up under the North Carolina pupil assignment law. I think the most recent one was [fol. 390] Covington and Polk, two cases, one arose in Raleigh, North Carolina and the Covington Case involved a county situation. In both of these cases the Fourth

Circuit held that Plaintiffs would have to first exhaust the administrative remedy provided by the pupil assignment law. Now in neither of those cases was there any twelve year situation involved. The other North Carolina case which is well known is Carson against Warlick, and no twelve year situation is involved there. I think what happened in Charlotte was that the school board voluntarily agreed to take in some students; but I think that there is a case pending now by some other people in trying to gain admission to school. But I think that initially what happened there was that the board itself came forward voluntarily and answered that students would be taken in.

The Court: Mrs. Motley, does your brief contain citations on all these various points and show what the Courts have upheld and not upheld?

Mrs. Motley: We have not referred to these Fourth Circuit cases. The only Fourth Circuit case to which I referred was the first Fourth Circuit case holding unconstitutional the Virginia pupil assignment law. I think they've had three in Virginia but the first one was held unconstitutional on its face because it was tied up with a state statute which required segregation. But also in that statute they [fol. 391] had many criteria similar to those here and I think it was Judge Hoffman who commented on these, but he said quite aside from that it's unconstitutional because it's hooked up with this state—other state statute which requires that the schools be operated on a segregated basis. And because of that, it was held to be unconstitutional on its face. But these other cases to which I have referred, I have not mentioned those in this brief specifically. I think that the case which is really controlling here is the Fifth Circuit decision in the Gibson Case because in the Gibson Case, the case first came before the Fifth Circuit on the question of whether the students were required to apply for admission to a particular school before seeking relief in the Federal Court. And in that case the Defendant said we now have this pupil assignment plan, and the Fifth Circuit said number one, you don't have to first apply for admission to a particular school where there is a policy of segregation and second, we could not consider the Florida pupil assignment law until there has been some desegrega-

tion. The case went back to the Trial Court and there was a full trial on the merits and the District Court held that the Florida pupil assignment law as he understood it and the implementing resolution constituted a plan as far as the Plaintiffs were asking for, and the Fifth Circuit said no, the adoption of a certain statute and implementing resolution did not in and of themselves constitute a de- [fol. 392] segregation plan especially where the record shows the continuance of racial segregation. And I think that Judges Rives in that opinion has made an effort to spell out the situation at least as far as this Circuit is concerned with respect to the operation of pupil assignment laws and he says in there that he interprets the Fourth Circuit cases not to be inconsistent with his view. He says that he interprets the Fourth Circuit cases as saying you can have desegregation simultaneously with a good faith application of a pupil assignment law. And he says that he sees no conflict between the Fourth Circuit and his decision.

The Court: Let me ask you this. The plan as submitted by the Atlanta School Board says in effect that all the pupils I assume are in the classes and in the schools that they are now in but it makes provision for the application of any person to go from one to another. You seem to think that's not a plan and when you say complete integration or complete abolition of segregation, just what do you mean? Do you mean taking all the schools and eliminating every student from every school in which that they now are? Just specifically how would you recommend going about it?

Mrs. Motley: Well no, I don't mean moving every student in every school. What I refer to in addition to assignment of pupils is the designation of certain schools as negro and white. The assignment of personnel to schools on a basis of [fol. 393] race alone. The operation of certain school programs such as the science program and music program on a racially segregated basis. These are community wide programs as I understand it. I think that as Judge Rives points out you can't just reassign all negroes back to the schools to which they have been in all this time and then say that you have desegregated. He says—

The Court: Well what—

Mrs. Motley: —obviously there must be some non-segregated—

The Court: What is there in this plan that says that everyone is sent back to the schools in which they are? It does do that in effect, but it leaves it open where there can be transfers. And another thing, do you or do you not concede that the area in which a child lives is a pertinent consideration?

Mrs. Motley: Yes, sir.

The Court: Near a school?

Mrs. Motley: I think the nearness to the school is a pertinent consideration but I don't see that in this plan.

The Court: Well, there's nothing in there to negative that. Now would I not be compelled to take judicial cognizance of the fact that in Atlanta the—residentially speaking there are vast white areas and colored areas and that in those areas the students are predominantly white and [fol. 394] colored? That's a fact, isn't it?

Mrs. Motley: Yes, sir.

The Court: Well then would it not follow if you say that they shall stay in the schools in which they now are for the great part, you would still have primarily white in some and colored in others, isn't that true?

Mrs. Motley: Yes, if the children are assigned on the basis of nearness to schools, you would have still many schools which are primarily white and which are primarily negro.

The Court: Now in spite of all that you say that they should not be left prima facie where they are and then pertinent changes made. I don't quite understand that.

Mrs. Motley: No, the objection which I have relates to the designation of certain schools as negro and white. The —also—

The Court: Mrs. Motley, that has been eliminated. I have already ruled that you cannot do that.

Mrs. Motley: Well, I don't know whether I am following the Court at this moment. I think that we put in evidence a directory of Atlanta, Georgia schools.

The Court: All that is eliminated. I have already ruled that you cannot designate certain schools as white and

certain schools as colored. I know that you object to that, and following the uniform decision of the Supreme Court [fol. 395] and other Courts, I think that you cannot do that and I've so ruled.

Mrs. Motley: Now the next point was the assignment of teachers on a racially segregated basis. The complaint alleged that teachers here were assigned on the basis of race. This was indicia of a segregated operation.

The Court: That has been done. No one denies that.

Mrs. Motley: And then the other—third point is that certain school programs such as this science program where the schools participate in a national science contest and the white schools participate in a national level as I understood it and negro schools participated on a local level.

The Court: What's in this plan about the national science program?

Mrs. Motley: There isn't anything in the plan which relates to the segregated operations of these kinds of activities, which are school programs on a segregated basis.

The Court: Now you say that so many of your objections are based upon your hypothesis that if this plan were adopted, that various things will still be done, such as a national science program, which shouldn't be done. I can't proceed on that basis. I have to proceed that if a plan is approved it will be in contemplation that the plan would be carried forward in a legal and legitimate way. I cannot assume that a plan will be approved and then will be [fol. 396] administered in a discriminatory way. There's no objection to the adoption of a legal plan to the effect that they may be violated. You could adopt that to a law against murder.

Mrs. Motley: Well I think that in the order which this Court made in July the Court asked for a complete plan which I understand encompassed these other matters. The plan which has been presented only relates to the assignment of pupils. Now if there were no evidence in the record of these other matters being involved in the school system, namely, the designation of certain schools as negro and white; and the assignment of teachers, that would be something else. But here the record shows that all these activities were operated on a segregated basis. Yet, the plan

does not attempt to deal with it and I think that we can infer from that that those things would continue to be operated on a segregated basis, because what you have here really is a continuance of the status quo. Everybody's been reassigned to a school to which they were already assigned whether they lived nearer to a white school or not. Those who live nearer to a colored school we concede they would be there normally, but—

The Court: Tell me what would you propose? Suppose I ruled with you all the way and as of next September, we are going to reshuffle the whole business. How would you start with reassigning the pupils.

Mrs. Motley: Well, since I'm not a school administrator, [fol. 397] I wouldn't say. I think that the Defendants should show how this should be done as school administrators. I think people who are now living nearer to white schools should be reassigned to white schools—

The Court: I think they've said rather definitely in the plan—

Mrs. Motley: Well I think what they did was to reassign everybody to a negro school whether they lived nearer to a white school or not. And our first objection is that following an order of this kind the school nearer may not then reassign on a basis of race. We object to an initial assignment after a trial of this kind on the basis of race.

The Court: Now—

Mrs. Motley: We think that the school authorities are required to assign some negro children to white schools; and that this is the only way in which the school authorities meet their duty to desegregate. What they have done is to shift the duty to the negro community once again and say now I have reassigned you on a basis of race, where it's your duty to come forward again and try to get out. We think that the initial assignment on the basis of race is unconstitutional. That the only way that you—for you—that a prompt and reasonable start and full compliance can be made by a school board under the Supreme Court's decision and under Fifth Circuit decisions is for the school [fol. 398] board not to reassign on the basis of race, and this says to the community that segregation is ended in the schools. Now if after a person has been reassigned and

there's been this initial start, the person complaining would have to exhaust an administrative remedy as I see it before coming into Court again. But I think when we are at this stage that everybody cannot be reassigned, and then everybody have to go through the whole business again of trying to get out of the negro school because the board has never done nothing but maintain the status quo and as I remember the Fifth Circuit decision in the Gibson Case, you have got to do something more than that before a Court can hold that you have made a start toward desegregation. Now once a start has been made, if they want additional time, it seems to me that that is the time to come into Court and say we need additional time because of these factors referred to in the Supreme Court's decisions, all of which relate to school administration, and at that time the Court should determine how much additional time they may need in the light of whatever evidence they present. But until they put some evidence in as to why they need additional time, I don't think that the Court can just say twelve years or whatever the time period is that they ask for, but there has been no start here toward desegregation. They haven't done anything to change the status quo. Continuing with the fourth objection, I think that because they have all of [fol. 399] these criteria which now must be considered in assigning people to school, that there are so many delays involved here that you couldn't make a prompt and reasonable start in terms of the time schedule which has been evolved here for the purpose of devising a—an administrative remedy. I think that you would be well past the beginning of school in September of any school year if you as a negro tried to move from a negro school to a white school. And in addition to two reviews by the board itself, of your application for transfer, the plan provides for an appeal to the State Board of Education and incidentally, in that connection, Your Honor, we would like to offer in evidence the rule of the State Department of Education relating to appeals to that body.

The Court: I'll let that be identified as Plaintiff's Exhibit 1, and admitted.

Mrs. Motley: We'd like to admit it as to pages 147 through 149, I guess, relates to this problem.

Clerk: May I have it? Beginning with part 36 here?

Mrs. Motley: Excuse me just a minute. Yes, that's right. One page 147. We'd like to offer that in evidence, Your Honor, and the plan does not say anything more than the fact that an appeal shall be made to a state board as provided by law, and as I see it, that is the law relating to appeals to the state board. So that you—

[fol. 400] The Court: Well, now, one other question. Did not the Fourth Circuit Court of Appeals in North Carolina deal at great length with this matter of administrative remedy and appeals?

Mrs. Motley: Yes, sir, in North Carolina their pupil assignment law is in effect and administrative remedy which should be pursued before going into a Federal Court. It establishes three or four basic criteria for admission to schools. The criteria as I see it, that most school situations have,—and the Court has held that you have to apply there—but as I understand it, that applies—that involves only an appeal to the local board.

The Court: Do you contend that this procedure for appeal to the state board in Georgia is not legal?

Mrs. Motley: No, sir. I think that it doesn't, from what I see there, that I don't know whether you could really get an appeal on this kind of situation. But what I'm referring to is the fact that it lengthens the time for exhaustion of administrative remedies to a point where a remedy becomes inadequate because you could not exhaust it in time to gain admission to school. I'm sure that it could be made legal, if that's the only consideration. But my objection goes to the lengthening of time before you could start a Court proceeding to determine whether you had been excluded on the basis of race. Because, in addition to that [fol. 401] appeal, there are two appeals before the board itself, the local board, after you've been once assigned by the superintendent, so that your remedy here is not really an adequate one and all of this must be pursued once you have been assigned on the basis of all these criteria. Now on—in our brief here we assume for example that a student applies within the time allowed for assignment or reassignment. That is, they allow a time between June 1st and June 15th, and I assume that they would wait until all the

applications are in before considering them. So, beginning with June 15th, if you assume that everyone adhered to the time schedule—and incidentally, there is no time within which the superintendent must advise you of action initially taken on your application—but assuming that the superintendent acted within two weeks thereafter, after having applied all these criteria to all these applications for transfer; and assuming that the board heard and determined your appeal on the same day; and assuming that the board heard your objections to its decision; and decided those objections on the 15th day—and incidentally, in that connection the plan does not provide that the board shall decide your answer. It just says that they shall hear them within fifteen days. But even assuming they heard it and decided it within fifteen days later from the way I see it you would be way down to September 23rd by the time you got finished with the board here and you would not have [fol. 402] even appealed to the state board. So that the school year would be well underway by the time you got through with the state board. And then it would be a question of whether you could transfer in the middle of the year or whether you wouldn't be then applying for a new grade and whether you wouldn't have to start all over again on this. Every year you would have this problem of trying to get your application heard and determined before September, and the plan as now drawn does not guarantee any such thing. There's no guarantee that you will have your application acted upon in such a manner that you can get some kind of redress before the school actually opens.

The Court: Is it not possible that the application was required to be filed in the early part of June so that the administrative appeal could be completed by September?

Mrs. Motley: Yes, I would assume so; but if you actually go through this as we have done in the brief here to try to outline it, even if the time schedule given is adhered to and you act promptly, you would still be down to September before you had even made your appeal to the state board. And one of the reasons that the first Virginia pupil assignment law was held unconstitutional on its face was because as Judge Hoffman pointed out there, it would take one hundred and five days before you exhausted the administra-

tive remedy provided there, and you would be well into the [fol. 403] school year and then the question would be whether or not you were applying for the next grade and therefore would have to start all over again. He doesn't decide that but he points that out as his reason for objecting to the plan there, because the remedy provided was inadequate. It didn't really give any relief with respect to the school year for which you sought a change. Now the same thing is true here as I see it. Now I'd like to say a further word with respect to our fifth objection with respect to two of these criteria which I think the Supreme Court has already dealt with in the case of Cooper against Aaron, the Little Rock Case. Now I think in the Little Rock Case the Supreme Court made it clear that the fact that there may be breaches of the peace and demonstrations of ill will by others outside the school situation or even within the school situation could not be used as a basis for excluding negroes from schools or from particular classes therein. Now as this Court may recall that case, the school board sought to suspend its Court approved plan of integration for a period of t vo and a half years in order that they have time to test further state statutes which were designed to nullify the Supreme Court's decision and also because within the school there had been bedlam and turmoil, and in short, the education of both negroes and whites had been affected by the situation, and the Supreme Court said neither of these considerations can be used to set aside [fol. 404] constitutional rights.

The Court: You had that in mind when you said your objection number three, that the element of peaceableness should not be in there, is that right?

Mrs. Motley: I'm sorry. I didn't get that?

The Court: I say you had that in mind when you a little while ago, you objected to the element of peaceableness being in those requirements?

Mrs. Motley: Yes, I think that they cannot take into consideration the fact that the admission of a negro would create breaches of the peace or turmoil or other situations by others. That this could not be used constitutionally as a basis for excluding them therefrom. Now our final objection relates to the fact that the plan has been made con-

tingent upon the enactment of statutes by the General Assembly of Georgia and the approval of the General Assembly of Georgia without more. Now we know that the order of this Court provided that the Defendants might submit their plan contingent upon approval by the Georgia Legislature. But as I see it the Atlanta School Board here has the power under state law to operate the school. They also have the power to make assignments of children to school. Since they have this power, any order by this Court enjoining discrimination in the operation of the system and enjoining discrimination with respect to assignment of pupils could not be made forever contingent upon approval [fol. 405] or enabling legislation by the Georgia Legislature. I think that it's clear that any order of this Court in this area relating to constitutional rights here is paramount, and any law of the state of Georgia which is designed to nullify that order is unconstitutional. And I think as long as the Georgia—the Atlanta board rather has the power to make assignments and has the power to operate the schools, an order of this Court and the Court approved plan of this Court must go forward despite any disapproval by the Georgia Legislature, and cannot be made forever contingent upon such approval. Now when the Bush Case was before the Fifth Circuit I believe for the second or third time, the school board in New Orleans sought to get out from under a Court decree which required them to start desegregation on the ground that the state had enacted a statute providing that the legislature had the power to classify schools as negro or white and there the Fifth Circuit held as long as they had the power to operate the schools they were the proper party. And the validity of that state statute wasn't involved, and the Court's enjoining them was still good as long as they had that power. And what the legislature might do or might not do with respect to the schools did not prevent the operation of that order so that I think that here this Court has enjoined the Defendants from operating the schools on a segregated basis and from making assignments on a racially segregated basis; [fol. 406] and he is providing that they come forward with a plan, and I think that once that plan is approved that it should go into effect in accordance with the order of this Court and shouldn't be made contingent upon approval by the Georgia Legislature.

The Court: There's a great deal that could be said on that subject, Mrs. Motley. The Court had in mind in passing its original order that the Legislature would meet in January and that any plan could not be put into effect until September 1960. So the Court had in mind that if the Legislature had its session in January, 1960, it would give the Atlanta School Authorities the right at its option to put this plan in. Then the plan could be effective. This Court has not approved any Georgia laws which might have been passed. They have not been directly attacked in the Court on a great many phases of this matter. This Court has never looked forward to what might be ruled in the future in the event that the Legislature does nothing in next January; and therefore this plan could not have been legally gone forward under the laws of Georgia. Very frankly, and I want to make this so clear that nobody can misunderstand it. The purpose of this Court in passing the order that it did was to give the people of Georgia through their Legislature the right if they saw fit to let the different communities speak for themselves as to what they wanted. Now I'm not saying—if you want to look a good ways [fol. 407] ahead, let's do it for just a moment. If the Legislature did not allow the Atlanta Public System to go through with this plan and if this Court said that the Atlanta Public System must integrate as the Supreme Court and all the Appellate Courts would order this Court to say eventually, and if this Court, being compelled to do by higher authorities should say to the Atlanta School Board that you must integrate regardless of what the Georgia law says, and if the Atlanta School Board then integrated as ordered by the Court, it is contended that under the laws of Georgia as they now stand the Atlanta School System would close up. Contention is made that if the Atlanta School System was forced to close, under the rulings of the Supreme Court of Virginia, that the closing of one school system would mean the closing of all the schools in Georgia. Now the point I want to make clear as to what I've had in my mind—and it's no secret—was this one thing: That I felt it was the duty of this Court to give the people of Georgia an opportunity to decide what they are going to do under all the facts and circumstances. This Court will

not attempt to say to the people of Georgia or say to the Georgia Legislature or to say to any School Board what they should do. The time is going to come, and how soon I do not know, and this Court will itself be forced to say that old practices cannot continue, and the only thing that this Court has tried to do is two things. First, to comply with [fol. 408] the requirements of the Supreme Court in the Brown Case which ordered deliberate speed, but to put just as much emphasis on the deliberation as it does on the speed. And I would be unfair to you and all the interests that you represent if I said to you that when I am compelled to order elimination of segregation that there is any intent on my part to do so, so speedily that there will be violence. I would say, however, that anyone who is so opposed to elimination of segregation that they would use violence to prevent it, that I couldn't give them one ounce of encouragement because the Court will not shape its decisions or policies in this matter to satisfy any person of that sort. I do not believe that we have that element in this community. We haven't had till now, and I'm confident we will not have in the future. Now if what you and the interests you represent are demanding is that this Court should order immediate integration of the races, knowing full well that that will mean the closing of our schools, the losing of our school teachers, the throwing of pupils out of school, in which event the colored people will suffer more than the whites, then I would have to say to you that I could not go along with you in any rapid integration of that sort. And unless you and the interests that you represent are willing to have elimination of segregation with such deliberation as to prevent all of those unfortunate consequences, I cannot go along with you. It's my purpose to [fol. 409] carry out the command of the Supreme Court and of the Fifth Circuit Court of Appeals to eliminate segregation. But as far as I personally have any part in that, it is my purpose to do so under a plan that will be a gradual plan and not a sudden, explosive plan; and also to give if I can the people of Georgia an opportunity to say whether or not they would rather have a gradual integration maybe patterned along the lines of the Charlotte Plan or whether their answer would be in the negative and they would say

on the other hand we would rather close every school in Georgia than to have one Negro to enter a school with the whites. Now the decision of closing the schools, that is on the people of Georgia. It's not on this Court. But the plan under which I assume the Department of Education in Atlanta proceeds to enforce here, I must assume is made in good faith and will be carried out in good faith. Any plan that is approved by the Court and then is violated and is not carried out on a non-discriminatory basis, of course then the Court would have to take such action as may be appropriate. Now I have gone at great length to explain to you what I meant by the General Assembly of Georgia having the right to let this plan go through. If the Legislature of Georgia says that Atlanta cannot put through any plan, the results I would not undertake to make any prophecy, and I'm not trying to threaten anybody or anything of that sort. Everyone would have to study the law and study the [fol. 410] previous rulings of the Supreme Court and the Appellate Courts and make their own conclusion as to what may happen in the future. I'm not trying to prophesy. I say all that to make clear to you why the Court made the plan of the Atlanta Board subject to the action of the Legislature, because the Court realized that the Atlanta Board could not inaugurate any plan unless the Legislature consented for the sole reason that the laws of Georgia say that if they do so, they would be closed. They would get no aid. I hope I have made myself clear on that.

Mrs. Motley: Well, if Your Honor please, I would just like to make a point for the purpose of clarifying our position. I don't think that at any time in this case we have ever asked this Court to decree an immediate overnight violent desegregation. I think that we pointed out at the trial of this case that in Cooper against Aaron the Supreme Court said again that in some situations an immediate overnight integration would not be possible. And that in those situations the Courts should scrutinize the plans of the School Authorities to make sure that those plans were designed to bring about desegregation at the earliest practicable date. We are quite willing to abide by the decision of the United States Supreme Court and the other Courts which point out that this will be allowed in certain situa-

tions, time in which to bring about full compliance with the [fol. 411] Supreme Court's decision. So that we are not urging here that this Court change its order which is already in existence requiring any speedy overnight desegregation. However, we do contend that the Supreme Court has said that a prompt and reasonable start must be made. We feel that because of certain features in this plan a prompt and reasonable start is impeded rather than made possible, which I have gone over, these vague standards and so on, and the time lag and all of that. I think that it's clear that in a situation involving this many negro students the school board could not all at once submit all qualified negroes to all of its schools to which they are otherwise qualified. So that our objection is not to the plan as a whole. Our objection is only to certain aspects of the plan which we think prevents a prompt and reasonable start toward desegregation. I think also that in other communities they have been forced with a question of whether the schools would be desegregated gradually or whether they would be closed altogether, and that in Virginia for example and in Arkansas they have already passed through that phase and the schools have been reopened. I think that the same thing will be true or at least I hope the same thing will be true in this situation, that the people of Georgia will elect to keep the schools open, and to commence the process of desegregation in peace and harmony, and that they will profit by the example of Virginia and Arkansas with respect to that.

[fol. 412] The Court: On the element of speed or not speed, I want to make this observation. That this case has moved up to this point with perhaps as much speed or loss of time as probably any of the cases. This suit was only filed in January, '58. We are presently nearly approaching January, 1960, which would be two years. It's almost two years. However, a great many of the cases pending along this line have been pending—some were filed before the Brown decision was ever made—and yet those Courts have been compelled to consider this matter for a long time. And in some instances, it's gone several times through the Appellate Courts, and this case has moved along to this point where a plan has been submitted I think more quickly than perhaps a great many of the other cases. I don't believe there has been any delay in bringing this matter up to this

point of submitting a plan. I think it has been done in a rather short time. But I'll have to say that I'm going to need a considerable amount of help that so far I haven't been given on various phases of this plan. Maybe some expert, some testimony and certainly some decision where you contend that this plan is inadequate or incomplete or unlawful because I don't have before me the decisions. I have been operating Court here ever since last summer, and up to now without skipping a single week, and I have not had time to brief this case with the thoroughness that [fol. 413] Counsel have the opportunity to brief it. But you would have to show me some decisions on certain aspects of this—of this matter here where you say the plan is illegal because the Supreme Court said that a lot of these phases in the Alabama statute were valid. I have to take them to be valid until shown to the contrary. I also assume that what the Supreme Court meant was that those provisions were valid if carried out in a valid way. I think that's understood. Is there anything else now you would like to offer?

Mrs. Motley: No, sir.

The Court: All right. I'll hear from the other Counsel.

Mr. Murphy: Your Honor, there is very little that I can add to the plan itself which is before Your Honor. It was filed in accordance with Your Honor's order and I think it is self-explanatory. I should like to say just this about it, that this plan is not the product of Counsel. It's the product of the administration and the Atlanta Board of Education. It was prepared as a result or submitted to this Court as a result of a great deal of consideration and study by the Board of Education, and I think I can assure Your Honor that it was approached by the Board of Education in complete good faith in an effort to adopt a plan that would be workable and would have some [fol. 414] reasonable probability of approval by the General Assembly of Georgia. It, so far as the criteria to be considered by the assigning official, the superintendent in this instance, is concerned, they follow substantially the Alabama placement plan and I am told by Mrs. Ira Jarrell that these psychological considerations are of great deal —are of a great deal importance and I think if Your Honor

assumes as Your Honor should that the purpose of the Atlanta Board of Education and of the superintendent of Atlanta schools is to administer this plan in good faith, that it does meet the requirements of Your Honor's order and meets the requirements of the decision of the Supreme Court of the United States in Brown versus Topeka. I have made a detailed study of the cases that were cited in the opposing brief. I didn't get the brief or have an opportunity to read it until this morning. I will say that in the Gibson Case, a copy of which is attached to the brief of the other side, the plan there adopted was struck down because as the Fifth Circuit indicates in its opinion, the form of application did not contain a clear indication that the applicant should indicate any choice of schools. And the Court went on to say in that case that the board may—referring to the Board of Education—if it chooses, submit for the consideration of the District Court a plan whereby the Plaintiffs and the members of the class represented by them are hereafter afforded a reasonable and conscious [fol. 415] opportunity to apply for admission to any schools for which they are eligible without regard to their race or color, and to have that choice fairly considered by the enrolling authorities. Now I think that's exactly what this plan submitted by the Atlanta Board of Education does. I don't know of anything that I can add to what has been said. Your Honor has already stated the consideration which prompted Your Honor to put in your order the requirement for the provision that it—that the plan might be subject to the enactment by the General Assembly of Georgia of statutes which would permit it to be put in operation and Your Honor knows as we all know that the Atlanta Board of Education is dependent upon the General Assembly of Georgia for money and it cannot operate without public funds. I don't know of anything else.

The Court: Mr. Murphy, in regard to this right of administrative appeal, would you explain to me your interpretation of the language on this point that if a student applies for transfer between June the 1st and June the 15th, whether or not that student could obtain an administrative order on his appeal if his transfer was turned down?

Mr. Murphy: Yes, sir, I think if he applies in the time prescribed by the order, then he can appeal to the Board and of course the superintendent passes on these applications initially, and I don't think it's possible to have them handled in any other way. He can appeal to the Board. The [fol. 416] Board does not have two appeals. The plan simply provides that it may hear the appeal by a committee and it isn't necessary for the entire Board of Education to sit, and that committee takes evidence and returns it to the entire Board which passes on the entire matter. Then it's considered by the Board and the extreme time as I read it, that's set forth in here for the handling of the matter, is fifty days. It must have the hearing within thirty days and notify the Board—the applicant of the action taken by the Board within twenty days after the conclusion of the hearing, not after the Board—

The Court: That's a total of seventy days?

Mr. Murphy: No, sir, a total of fifty days from the time the superintendent acts. The superintendent is not required to act within any specific length of time. In other words the application must be filed between June the 1st and June the 15th and the superintendent then acts upon it. And after the superintendent acts upon it, the child is notified of the action. The child has got fifteen days in which to request a hearing before the Board, but then the child doesn't have to wait that long, but from the time the hearing is requested as I read it, there's a total there of six—fifty days, thirty and twenty. Now of course so far as the appeal to the State Board of Education is concerned, as Your Honor knows, that's provided by state law. There isn't [fol. 417] anything that the Atlanta Board of Education can do about that, and the Supreme Court—I mean the Fifth Circuit recognized that right of appeal. It's contained in the statement of law in the old case of Davis against Cook with which Your Honor is probably familiar. The plan does provide that any person desiring to may appeal to the State Board of Education as provided by law. If we were to strike that out, the right of appeal would still exist because it doesn't arise under the plan. It arises by virtue of the state law. If the state law applies to it, and I think it does, because it is very broad—

The Court: Do you think the Defendants would be opposed to amending that plan so as to make it clear that all this procedure could be completed by the opening of school? You see, it says the superintendent shall act on it but doesn't say within what time.

Mr. Murphy: I know of no reason why the Board of Education would be adverse to amending the plan so as to put a time limit within which the superintendent must act upon an application. There's no set date for the schools to open, as Your Honor knows. Sometimes they open about the first of September and sometimes it's about the second or third week of September.

The Court: No, I would assume though that they would open the early or middle part of September at the latest.

Mr. Murphy: I have no jurisdiction or authority to [fol. 418] speak for the Board on that particular thing, but I am quite sure I can say, Your Honor—Mr. Latimer is here—that the Board would have no objection to amending the plan so as to set up a time limit for consideration of these applications by the superintendent. I realize that there's no time fixed for that and it was not fixed because of the possibility of a great many administrative difficulties going from the number of plans—of applications that may arise under this thing, and they won't all be applications for—of negro students to white schools. I think there will be all sorts of applications for transfer and they will all have to be passed upon.

The Court: Are you saying that you have had about as much experience as the Court has in operating schools?

Mr. Murphy: Yes, sir. I never did teach school, Your Honor. I don't know whether Your Honor ever did or not.

The Court: No.

Mr. Murphy: There's one thing I'm sure I never would have patience enough to teach school. Anything you want to say, Mr. Edenfield?

The Court: Ladies and gentlemen, I certainly cannot decide this case now. I'll have to give these papers, pleadings, careful study and perhaps there will be some questions which I will want to propound to Counsel which I can do by mail. I trust it will not be necessary to set it

down for any further hearing. I would like to decide it as [fol. 419] promptly as possible.

Mr. Murphy: Your Honor, I would call Your Honor's attention to the fact that the Legislature meets as Your Honor knows on the second Monday in January, and Counsel in this case are directed to transmit by the order of the Board, to transmit copy—copies to the President of the Senate and Speaker of the House of Representatives upon Your Honor's authorization. Of course the Legislature will be in session for forty days.

The Court: Well I assume that transmitting it to them will be useful, but to go forward it would have to be some type of bill that was introduced in the Legislature.

Mr. Murphy: Yes, sir.

The Court: I assume it will be. I don't know.

Mr. Murphy. I assume so too, Your Honor: but I don't know of anything that the Board of Education can do other than to provide for its being read before the General Assembly.

The Court: Well—

Mr. Murphy: I have reference to the time element.

The Court: I want to make it clear that the Court has not made a commitment to any party about what the Court will do in the future on this matter or what would be done in the event this that and the other thing may happen. All of that is left absolutely open.

Mr. Murphy: Yes, sir. We understand that, Your Honor. [fol. 420] The Court: I'm not able to say what will happen in the future and what action the Court will take. All that's absolutely open. Well, Court is recessed for fifteen minutes.

Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 422] Minute Entry of Argument and Submission—May 1, 1963 (omitted in printing).

[fol. 423]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20273

VIVIAN CALHOUN, et al., Infants, by FRED CALHOUN, their father and next friend, et al., Appellants,

versus

A. C. LATIMER, et al., Appellees.

Appeal from the United States District Court for the Northern District of Georgia.

OPINION—June 17, 1963

Before Rives, Lewis* and Bell, Circuit Judges.

Bell, Circuit Judge:

I.

This appeal from an order denying a motion for further [fol. 424] relief brings up for review, for the first time,[1] the plan for the desegregation of the Atlanta school system. The plan was formulated pursuant to court order, and approved by the court on January 20, 1960. It became effective on May 1, 1961 for the school term 1961-62 beginning in September 1961. It was applied to the twelfth and eleventh grades at that time for the purposes of desegregation, to the tenth grade beginning with the 1962-63 school term, and will be applied to the ninth grade beginning with the 1963-

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* Of the Tenth Circuit, sitting by designation.

[1] Appellants filed notice of appeal from the order of the court dated March 9, 1960 refusing to make the plan effective for the school term 1960-61 but dismissed the appeal.

64 school term. It is to be applied progressively to the next succeeding grade each school term thereafter until all grades in the school system have been included, and desegregated.

The sequence of events in this case began with the filing of a complaint on January 11, 1958 by appellants seeking the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution: *Brown* v. *Board of Education of Topeka*, 1954, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873, having proscribed racial discrimination in public education. The District Court had first enjoined appellees, members of the Board of Education of the City of Atlanta, and the school superintendent, from enforcing and pursuing the policy, practice, custom, and usage of requiring or permitting racial segregation in the operation of the schools, and from engaging in any and all action which limited or affected admission to, attendance in, or the education of the appellant children, or any other Negro children similarly situated, in the schools on the basis of race. A reasonable period of time was allowed within which to comply with the order, and for bringing about a transition to a school [fol. 425] system not operated on the basis of race. The school board was required to present a plan on or before December 1, 1959 designed to bring about compliance with the order, and which would provide for a prompt and reasonable start toward desegregation of the public schools of Atlanta, and a systematic and effective method for achieving such desegregation with all deliberate speed.

A plan was submitted, contingent upon the enactment of statutes by the State of Georgia permitting the same to be put into operation. It provided procedures of uniform application for the assignment, transfer, or continuance of pupils among and within the schools of the system. The plan was largely modeled upon the placement law approved as constitutional on its face in *Shuttlesworth* v. *Birmingham Board of Education*, N. D. Ala., 1958, 162 F. Supp. 372, affirmed, 358 U. S. 101, 79 S. Ct. 221, 3 L. Ed 2d 145. It was, however, amended in various respects by court order before final approval to meet some of the objections of appellants. There was also objection to the plan being con-

tingent upon changes in the state laws which then required segregated schools, under penalty, among others, of loss of state financial support. The court limited the contingency to one year and included two grades in the plan for the first year of its operation. It was to be invoked for the 1961-62 school year in any event. See *Calhoun* v. *Members of Board of Education, City of Atlanta*, N. D. Ga., 1959, 188 F. Supp. 401, 188 F. Supp. 412.

II.

The Georgia laws were changed, obviating harm to public education, and making it possible for the plan of the school [fol. 426] board to proceed on schedule. Schools were no longer classified as white or Negro, but the plan did contemplate that each child would continue in the school to which assigned for the then present school term unless and until transferred, on request, to another school. Applications for transfer were to be filed between May 1 and May 15 in each school year. This was the method of transition agreed upon rather than some other plan requiring reassignment by school officials. Any child was free to seek transfer to the grades within the plan.

Some three hundred Negro children and one white child obtained application forms for transfer for the 1961-62 term. Only one hundred and thirty of these were actually filed by Negro children. Ten of these were granted and reassignment was made to the eleventh and twelfth grades of formerly white schools. The transfer sought by the white child out of one of these schools because Negroes were to be admitted was denied. See *Stone* v. *Members of the Board of Education, City of Atlanta*, 5 Cir., 1962, 309 F. 2d 638. At this time there were one hundred thirteen elementary schools, grades one through seven, and twenty two high schools, grades eight through twelve, in Atlanta. There were no junior high schools. Forty one of the elementary schools were all Negro in attendance while seventy two were all white. This is still true since the plan has not reached the elementary grades. There were five all Negro and seventeen all white high schools. This latter number was reduced to thirteen by the transfer of the ten Negro

students. Forty four additional Negro students, out of some two hundred sixty six requesting transfer, were transferred, to white high schools for the 1962-63 term resulting in the desegregation of seven additional formerly all white [fol. 427] schools. The result to date is that there are eleven integrated high schools in Atlanta, five all Negro high schools and six all white high schools.

Special intelligence tests were given those students seeking transfer under the plan in 1961, but this requirement was abandoned prior to 1962; thus, our discussion will center on the practices and procedures required under the plan for 1962. Only a few of the seventeen factors or criteria set out in the plan were used. A scholastic ability and achievement test routinely given to every child in the grades in question in the school system was used in considering the applications. The standard used was that the transferee had to score a grade at least equal to the average of the class in the school to which transfer was requested. Such a requirement is, of course, discriminatory per se when applied only to Negro students. Proximity of the residence of the student to the school in question, subject to variation for educational reasons, and also the reasons given on the application for the requested transfer were other factors used. Each student was also given a personality interview by school officials to determine probable success or failure in the new school.[2]

When the plan became effective, all students in the grades to be segregated were already assigned to high schools. Thus, the plan to date encompasses only those students wishing to transfer, and new students entering a school for [fol. 428] the first time in the desegregated grades. However, it has not been applied to new students, nor to those students being transferred at times other than during the period May 1 to May 15 under the plan. Transfers, other

[2] Such solicitude has rightly been condemned where applied only to Negroes, *Green* v. *School Board of the City of Roanoke, Virginia*, 4 Cir., 1962, 304 F. 2d 118, although it would appear, where done in good faith, and there is no contrary contention here, to lend itself, at least in the early days of transition, to assuring the success of a plan.

than during this period, not substantial in number, are known to the school board as informal transfers, and are to be distinguished from transfers under the plan, called formal transfers.

There is no evidence that the criteria applied in informal transfers were racially discriminatory as among informal transferees, but they were apparently different from the criteria applied in formal transfers. The school superintendent testified that the criteria applied in formal transfers included the reason given by the student for requesting transfer, tests that were a part of his permanent record, grades, teacher opinion and educational judgment as to whether the request, for these reasons, would be educationally justified. Also considered was proximity of residence to school and the capacity of the school. The difference in the requirements for formal and informal transfers, in the main, was that no personality interview was required for informal transfers, nor does it appear that the standard of scholastic ability basis was the same.

The form used in requesting transfers as well as the plan itself is designed to apply in the admission and assignment procedure, as well as in the transfer procedure. The District Court said in this regard:

> "Essentially the Plan contemplates that all pupils in the schools shall, until and unless transferred to some other school, remain where they are, all new and [fol. 429] beginning students being assigned by the Superintendent or his authority to a school selected by observance of certain standards as set forth in the proposed Plan." 188 F. Supp. 401, 406, supra.

Not one of the Negro applicants for transfer has complained individually to the District Court at any time. The case is still proceeding as a class action. Both appellants and the school board were satisfied to rely largely on the testimony of the school superintendent. His testimony in substance was that the board was abiding the letter and the spirit of the plan approved by the court. Pupils were assigned to schools they attended the previous year in order to establish a base from which they were

free under the plan to request a transfer. He contended that the Atlanta school system was desegregated, and pointed out that all mention of race had been removed from the school directory, official reports, building programs, and all other classifications. Schools are no longer designated as white or Negro. Negro students assigned to previously all white schools participated in both regular and extra-curricular activities, including honor banquets, clubs and other activities on the basis of free choice, and their parents attended Parent-Teacher Association meetings, athletic events, graduation programs and other school activities free of racial discrimination. School events to which the public is invited are not segregated, nor are meetings of professional committees.

He testified that there were no attendance areas or zone lines established by the board, but that lines are sometimes drawn administratively between schools in an attempt to [fol. 430] equalize class loads. There was no evidence before the court that they were based on race. The Atlanta system is divided into five sub-areas with an assistant superintendent in charge of each area. One sub-area has only all Negro schools in it, but there is no evidence of white children living in it, or that it resulted from gerrymandering.[3]

Another pertinent fact is that there is overcrowding in the school system particularly in those schools still having all Negro populations, with additional schools being needed. Some white schools are under populated. The growth in the school population in recent years is almost entirely Negro, with considerable change in area patterns from the standpoint of changing from white to Negro residents.

The District Court in this case, after hearing all evidence offered, and full arguments, held:

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[3] The dearth of evidence probably results from the parties each taking the position that the burden of proof was on the other. The burden is plainly on the board to justify the plan and the delay under it. Having done so and having obtained the approval of the court, we think that the burden shifted to appellants to at least make a prima facie showing that changes were in order.

"There is no disputing that discrimination had existed prior to the Order of this Court of January 20, 1960, and that the Order of that date was designed to eliminate the discrimination over a period of years. Even plaintiffs' counsel upon the original trial disclaimed any purpose of seeking to have 'wholesale integration.' The only question then involved was the plan by which discrimination could be eliminated; a [fol. 431] Plan was carefully prepared and adopted and no appeal taken. The Plan is eliminating segregation, but until it has completed its course there will of course still be areas (in the lower grades) where segregation exists. The Court is therefore at a loss to see how anything could be accomplished at this time by 'an order enjoining defendants from continuing to maintain and operate a segregated, biracial school system,' for the Court has already taken care of that in its decree of January 20, 1960. There is no evidence that defendants are 'continuing to designate schools as Negro or white,' nor that they are maintaining 'racially segregated extra-curricular school activities.'

"The assigning of teachers and other personnel on the basis of race and color is not now passed upon but is deferred (as other courts have done) awaiting further progress made in the desegregation of the students.

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"Neither does the evidence show that defendants are maintaining a 'dual system of school attendance area lines.' Proximity to the schools in question is a factor considered by the defendant Board. It is not shown that defendants are acting arbitrarily in connection with the assignment of pupils in relation to their distance from the school. It does appear that area lines (where such exist) are sometimes changed [fol. 432] for the sole purpose of relieving overcrowded conditions in the schools.

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". . . The Plan heretofore approved by this Court, and now under attack, has been administed fairly and

in good faith by defendant Atlanta Board of Education, the local authorities have given utmost cooperation in maintaining law and order, and the number of students being transferred . . . from previously designated colored schools to previously designated white schools is increasing at an accelerated rate each year as the lower grades are reached. This Court feels that the public interests demand that the Plan now in operation be continued according to its terms and not be summarily displaced by the new Plan of Desegregation proposed by plaintiffs." *Calhoun* v. *Latimer*, N. D. Ga., 1962, F. Supp. , 7 Race Rel. L. Rep. 1054.

III.

The questions presented may be reduced to four in number. First, can the Atlanta plan be justified in the light of the results of its operation to date, and in view of the teachings of *Brown*, supra, the second *Brown* case, 1955, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, *Cooper*, infra, and the most recent decisions of this court, handed down long after the Atlanta plan became effective, *Bush* v. *Orleans Parish School Board*, 5 Cir., 1962, 308 F. 2d 491; and *Augustus* v. *The Board of Public Instruction of Escambia County, Florida*, 5 Cir., 1962, 306 F. 2d 862. Second, assuming that it may, has it been applied in a discriminatory man- [fol. 433] ner? This includes the questions of admission, assignment, transfers, both formal and informal, and extracurricular activities. Third, was it error for the District Court to postpone consideration of the practice relating to the assignment of teachers? Fourth, did the court err in not speeding up the plan as suggested by appellants?

And with these facts before us, we begin the consideration of the questions presented with the mandate of the Supreme Court in the second *Brown* opinion in mind. There the court, with regard to eliminating racial discrimination in public education following its decision in the first *Brown* case, supra, said:

"Full implementation of these constitutional principles may require solution of varied local school prob-

lems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. . . .

"In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional [fol. 434] attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

"While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school

plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining [fol. 435] admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases."

And see *Cooper* v. *Aaron*, 1958, 358 U. S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5, where, after reiterating what was said in the *Brown* implementation decision, and the investiture of supervisory powers in the District Courts for the necessary transition from segregated to desegregated school systems, the court said:

"Under such circumstances, the District Courts were directed to require 'a prompt and reasonable start toward full compliance,' and to take such action as was necessary to bring about the end of racial segregation in the public schools 'with all deliberate speed.' . . . Of course, in many locations, obedience to the duty of desegregation would require the immediate general admission of Negro children, otherwise qualified as students for their appropriate classes, at particular schools. On the other hand, a District Court, after analysis of the relevant factors (which, of course, excludes hostility to racial desegregation), might conclude that justification existed for not requiring the present nonsegregated admission of all qualified Negro children. In such circumstances, however, the courts should scrutinize the program of the school authorities to make [fol. 436] sure that they had developed arrangements pointed toward the earliest practicable completion of desegregation, and had taken appropriate steps to put their program into effective operation. . . ."

Nothing then could stay the inexorable hand of the Constitution in this regard. Some school boards complied without the intervention of the courts. Others acted under court order, as did the Atlanta board. The cases arising are myriad, but each, with respect to transition, goes back to the fountainhead, *Brown* and *Cooper*. Does the plan as conceived and administered comport with the constitutional mandate and the duty imposed on school boards and District Courts? Gradualism in desegregation, if not the usual, is at least an accepted mode with the emphasis on getting the job of transition done.

IV.

The questions here may be the better discerned in the background of what appellants offered by way of a plan in the District Court. The plan proposed by them in connection with the motion for further relief which is the subject matter of this appeal suggested a speed up of five years in the original twelve year plan for transition. Their suggestion was that grades eight and nine rather than nine be desegregated in September 1963. They would desegregate grades four, five, six and seven in September 1964, and grades one, two and three in September 1965. They would reassign all high school teachers, counselors, principals and supervisors prior to the opening of school in September 1963 on the basis of qualification and need [fol. 437] without regard to race or color. The same procedure would be followed as to such personnel on the succeeding years in connection with the proposed desegregation procedure. All school sponsored, school related, school supported, school sanctioned extra-curricular school activities would be open to all qualified students without regard to race or color as each grade is desegregated. Desegregation would be provided on the basis of drawing school zone lines for each school and assigning all children living in the zone to the school without regard to race or color. It is this last suggestion that is the bare bones of this case and which gives rise to the first question.

Appellants do not object to a gradual plan. They do seek to speed it up from a twelve to a seven year span for ac-

complishment. What they object to is that feature of the court approved plan that permits the continued assignment of those children already in school to the same schools with the right to transfer. This question has not heretofore been before this court. We held in *Bush* v. *Orleans Parish School Board*, supra, and in *Augustus* v. *The Board of Public Instruction of Escambia County, Florida*, supra, that dual school districts must be abolished as they related to the grades being desegregated. We have never laid out a method of abolishment, or adopted a policy of absolutism. The Atlanta plan of abolishment is one of gradualism by permitting transfers from present assignments. The New Orleans plan in *Bush*, formulated by the District Court instead of the school board, begins with the first grade. It recognizes the dual system and provides for its elimination by permitting the children, at their option, to attend either the formerly all white or all Negro school nearest their homes, with transfers to be allowed provided they [fol. 438] are not based on consideration of race. The Houston plan which was also court formulated, *Ross* v. *Dyer*, 5 Cir., 1962, 312 F. 2d 191, is substantially like that of New Orleans. We do not yet know what method of eliminating the dual system is to be used in the *Escambia County* case. Even if it may be said that there is a dual system in Atlanta, and the evidence does not so disclose,[4] it can also be said that there is an option under the Atlanta plan just as there is under the New Orleans and Houston plans, assuming the plan is applied to transfers as well as assignments of all new students in desegregated grades, and is not based on consideration of race.

This court disapproved one feature, in the nature of an option, of a plan for desegregating the Dallas school system which afforded a modicum of freedom of choice by permitting transfers on the basis of race. *Boson* v. *Rippy*, 5 Cir., 1960, 285 F. 2d 43. The Supreme Court has now affirmed this position in holding invalid similar features in

[4] The dual system undoubtedly continues in the grades not yet reached by the plan. It exists in residual form in the grades reached because desegregation has not reached the elementary school grades which feed the high schools.

plans of the Nashville and Knoxville school systems. *Goss v. Board of Education, City of Knoxville, Tenn.*, —— U.S. ——, 31 L. W. 4559, No. 217, Oct. term, 1962. But, as this court was at pains to say in *Boson* v. *Rippy*, a school board has ample authority to transfer pupils from school to school upon any reasonable and legitimate basis without regard to race or color. The New Orleans and Houston plans contain provisions in point. The Charlottesville, Virginia plan also demonstrates this teaching. Once assignments have been made there on the basis of residence, transfers are [fol. 439] permitted upon request of parents or students, and school officials are to take into account residence, academic qualifications, personal desires, need for particular courses, school enrollment, available teaching personnel and physical facilities, and "other lawful and objective considerations", but the court made it clear upon review of the plan that race cannot be a consideration. *Dodson* v. *School Board of the City of Charlottesville*, 4 Cir., 1961, 289 F. 2d 439.

The *Bush* and *Escambia County* cases forbid dual school districts. They authorize the option system. *Boson* v. *Rippy* permits transfers out of single or integrated districts if not based on race. The Atlanta plan when considered in its over-all scope falls within the ambit of these bench marks, if properly and fairly administered. We understand its scope, and it must be so applied, to include application to the assignment of any student new to a school for admission in a desegregated grade. It is to be applied to all transfers, be they formal, informal or otherwise.

The main thrust or force of its application will be in the admission and assignment from elementary to high schools, and to the first grade. This means that for the school term beginning in September 1964, the plan will lay hold of the feeder system for the first time. This follows from the fact that such factors as are used for assignment and transfer must be used system wide in the assignment and transfer of seventh grade students to the eight grade since they will be moving from one school to another, elementary to high school. This will remove even the residuum of the dual system from this grade, and will rapidly dissi-

pate it from the other high school grades as other succeeding elementary grades reach the eighth grade. The dual [fol. 440] system will be entirely eliminated when the plan reaches the first grade.

The unique Atlanta plan of desegregation from the top down operates in fits and starts when compared with what has become the almost universal plan of starting in the first grade and working up. Nevertheless, it is the one approved and used to date, and it appears that the end mandatory result of a desegregated system will be accomplished under it. And while the progress to date is not looked on with favor by appellants, it may be noted that other results are being attained that are not present in those systems following plans beginning with the first grade. These have to do with the desegregated extra-curricular activities that exist in high schools, but not in elementary schools, such as honor societies, athletics, clubs, graduation activities and the like. The importance of these results cannot be gainsaid.

The decision reached in this case is in the light of the fact that there is no evidence that the Atlanta School Board has acted other than in the utmost good faith throughout this litigation. There is no evidence that the District Judge has proceeded except in the highest tradition of the federal courts, and in a persistent and wise manner to accord appellants their constitutional rights while at the same time preserving the educational process in the transition period.

Our decision must also be rendered upon a consideration of the most recent pronouncements of the Supreme Court, *Goss* v. *Board of Education, City of Knoxville, Tenn.*, supra, and *Watson* v. *City of Memphis*, —— U.S. ——, 31 L. W. 4498, No. 424, October term, 1962, which make it plain that [fol. 441] the time available for the transition from segregated to desegregated school systems is, with the passage of years since the *Brown* decisions, becoming more sharply limited. Indeed, we so stated in an opinion theretofore rendered on May 24, 1963. *Davis* v. *Board of School Commissioners of Mobile County*, —— F. 2d ——. But, on the same day, where a District Court had refused a temporary injunction in a school case, the same panel ordered an im-

mediate start on a one grade per year basis. *Stell* v. *Savannah-Chatham County Board of Education*, —— F. 2d —— (opinion by C. J. Tuttle, concurring, JJ. Rives and Bell). This is said to point up that each case stands to a large extent on its own. There is no circuit-wide formula or minimum by which to measure steps forward or backward, and no decision has so suggested. Good faith and substantial progress are the indispensable ingredients.

So considered, we hold that there is insufficient evidence on which to base a determination that the start made in the Atlanta schools is not reasonable, or that the plan is not proceeding toward the goal at deliberate speed. The court did not err in denying the speed up. It was a discretionary matter, and there is no showing of an abuse of discretion, in law or in fact.

Nor did the court err in failing to substitute the absolute zone plan as suggested for the present plan to accomplish acceleration. There was no evidence before the District Court from which an approximation might be made of the amount of desegregation reasonably to be expected under such a zone plan, or under an option plan with a transfer provision such as is being used in New Orleans and Houston, or under a zone plan with a transfer provi-
[fol. 442] sion such as is being used in Charlottesville. In short, there was nothing to show the inadequacy of the present system in comparison.

It is clear that no student has complained to the court concerning discriminatory treatment by those in charge of the schools, either in being afforded transfer rights, or in the administration or application of those rights. Counsel for the school board recognized in argument the possible discriminatory application of the plan with respect to differences in requirements for formal and informal tranfers. No ruling was made in the court below on this or the fact that the plan is not being used for the initial assignment of students new to a school and to grades that have been desegregated. They were there considered, if at all, as incidental to the main question of continuing present assignments. They were never called to the attention of the school board.

V.

We affirm the order of the District Court within the context of what we have had to say regarding the plan, and having in mind that the jurisdiction of the District Court will continue. Such deficiencies as we have pointed to, or other matters involving discrimination which may arise may be considered by the District Court in the event they are not adjusted by those having charge of the schools. See *Ross* v. *Dyer*, supra, where the brother-sister rule was voided. This is in line with the procedure followed in *Dodson* v. *School Board of the City of Charlottesville*, supra, where a plan already in operation was recently examined by the Court of Appeals for the Fourth Circuit and found [fol. 443] deficient in some respects. The decision was affirmed with a proper caveat to the deficiencies. It was there said:

> "The action we take is based on the particular history and circumstances associated with this case. In appeals involving school desegregation problems, where the Supreme Court has permitted a period of transition for the desegregation of schools, each case is to some extent dependent on its own particular facts. The attitude of particular school authorities, their past conduct, the progress they have been making, the varying administrative difficulties that may be shown to exist in different localities, the court's view as to the officials' future intentions, and other factors must be taken into consideration."

The plan of the District Court here is for the transition period. Time will tell whether other questions regarding discrimination in the areas of extra-curricular activities, or leading from the assignment of teacher personnel are rendered moot. There is no evidence to support the charge of discrimination in extra-curricular activities in the grades that have been desegregated in Atlanta, and the District Court did not err in postponing the consideration of teacher assignment question. *Augustus* v. *Board of Public Instruction of Escambia County, Florida*, supra.

In the meantime the Atlanta plan is working. Progress is the test, and the necessary transition is taking place. There has been no trouble. All responsible officials and many private citizens have cooperated to make it work, and to preserve public education.

[fol. 444] We do wish, however, to point out some fundamentals to be borne in mind in the future handling of this and like matters where an approved plan is in operation. Whether to effect a plan, to speed it up, or to otherwise modify it is in the first instance for the school board. This is likewise true as to problems arising in connection with the administration of a plan. The courts are ill equipped to run the schools. Litigants must not ignore school officials, and school officials must not abdicate their function to the courts. They, like the courts, are bound by the Constitution as interpreted by the Supreme Court. *Cooper* v. *Aaron*, supra. With these principles in mind, this record discloses no problem that could not be resolved between appellants and the school officials based on the judgment of the school officials as educators, with the application of wisdom, forebearance and mutual trust to the educational purpose of schools.

The judgment appealed from is Affirmed.

RIVES, Circuit Judge, Dissenting:

With deference I respectfully dissent. Before expressing reasons, it seems appropriate to state my agreement that all of the parties to this litigation and the district court as well are entitled to the complimentary remarks made of them in the majority opinion. I think, too, that the appellants now before the Court should not be faulted in seeking additional relief because of their willingness, for [fol. 445] a period of two years, to permit the Atlanta plan to be tested out without appealing to this Court for any faster relief.

It is apparent from the record that the district court, working patiently with the plaintiffs and with the Atlanta School Board, sought to devise a method by which the first breach in the race barriers might be made. However, it is no criticism of the good faith of the parties involved

for me to point out now, as did the Supreme Court in its opinion in *I. A. Watson, et al.* v. *City of Memphis, et al.*, —— U.S. ——, No. 424, October Term, 1962, that:

> "It is now more than nine years since this Court held in the first *Brown* decision, *Brown* v. *Board of Education*, 347 U. S. 483, that racial segregation in state public schools violates the Equal Protection Clause of the Fourteenth Amendment."

Largely on the basis of what the Court there said, and also because this Court has expressly required other Boards of Education in litigation in this Circuit, see *Augustus* v. *Board of Public Instruction*, 5 Cir., 306 F. 2d 862, and *Bush* v. *Orleans Parish School Board*, 5 Cir., 308 F. 2d 491, to take steps towards desegregation of the schools that go considerably further than was required by the district court in this case, I cannot agree that we should affirm this judgment. For us to do so amounts to a backward step rather than a step consistent with what I consider to be the clear teaching of the Supreme Court's unanimous opinion written by Mr. Justice Goldberg in the *Watson* case:

> [fol. 446] "Given the extended time which has elapsed, it is far from clear that the mandate of the second Brown decision requiring that desegregation proceed with 'all deliberate speed' would today be fully satisfied by types of plans or programs for desegregation of public educational facilities which eight years ago might have been deemed sufficient. Brown never contemplated that the concept of deliberate speed would countenance indefinite delay in elimination of racial barriers in schools. . . ."

The essential fact, as disclosed by the record before us, is that the schools of the City of Atlanta do not have a single grade, in either the grammar or high schools, in which Negro children are permitted to become students on the same basis as are white children. In other words, whatever may have produced this result, it is not disputed that it is impossible for a Negro student in the top three grades, which have, under the Atlanta plan, been "desegregated,"

to enter such desegregated school without being subjected to requirements that *do not apply* to any white student in the grade. This comes about by reason of the fact that, while the basis for first considering applications of a Negro student for a transfer to a white school is the test normally conducted during the school year for all students, both white and Negro alike, the Negro student seeking to transfer is required to meet *standards* based upon an analysis of his tests and also based upon a "personality interview," which do not apply to the white students who are already enrolled in the school, or who come into the grade from a lower grade by reason of having been in a "feeder" system [fol. 447] as to which all white children are in white schools and all Negro students are in Negro Schools.[1]

As is pointed out by the majority opinion:

> "The standard used was that the transfee (the Negro student) had to score a grade at least equal to the average of the class in the school to which transfer was requested."

And, as also pointed out in the majority opinion:

> "Each student [transferee] was also given a personality interview by school officials to determine probable success or failure in the new school."

On the face of it, of course, this means that if a Negro student seeks a transfer from Booker T. Washington High School (Negro) into the twelfth or eleventh grade at Northside High School, a white school, the Negro student has to demonstrate from his record at Booker T. Washington that his grade was "at least equal to the average of the class" in Northside, whereas *every* passing student entering that grade from the lower grade in Northside High School would automatically be admitted in such grade. Of course, it

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[1] I use the term "white and Negro schools" in a practical sense. Considerable attention is paid by the trial court and the majority to the fact that the words "Negro" and "White" no longer appear in the literature of the Board of Education. That there are still Negro and white schools, however, is conceded by the appellees. See footnotes 3 and 4, *infra*.

would be ridiculous to suggest that before students passing from eleventh grade Northside to twelfth grade Northside could be admitted to the twelfth grade their prior record must have equaled the average of the class in the [fol. 448] eleventh grade. It takes no professional testimony to indicate the absurdity of such a requirement. Yet this is precisely the requirement which is imposed on every Negro transfer student. Moreover, so long as an eleventh grade student attains the passing standard required by the school at Northside, he passes into the twelfth grade without being subjected to a "personality interview" by school officials to determine probable success or failure in the twelfth grade.

Even though the appellants did not appeal from the original decision of the trial court approving the transfer plan in the Atlanta Schools, this did not foreclose the right of appellants to complain that, when the plan was actually put into operation, it was operated in a manner that clearly discriminated against the Negro students. Nor is this a criticism of the good faith of the School Board, which may have considered that it had adequate reasons for wishing to impose these higher standards on the first Negro students who were to be admitted into the white schools. This, however, was not within the contemplation of the district court's original order, which expressly provided that the plan was not to be based on consideration of race. It seems to me that the majority opinion justifies the continued approval of the present plan *on the assumption* that it is "not based on consideration of race," because the opinion states:

> " . . . it can also be said that there is an option under the Atlanta plan just as there is under the New Orleans and Houston plans, *assuming* the plan is applied to transfers as well as assignments of all new students [which, of course, it is not] in desegregated grades, [fol. 449] and is not based on consideration of race [which it plainly is]." (Emphasis added.)

Since the assumption on which the opinion rests is demonstrably not correct, the opinion cannot be logically supported.

The Court of Appeals for the Fourth Circuit, in *Green* v. *Board of Education of City of Roanoke*, 4 Cir., 1962, 304 F. 2d 118, 123, has expressly met and answered this point; that is, whether the requirement of a higher *standard* of performance of Negro students, based on tests uniformly taken by all students, meets even the initial requirement for desegregating a single grade:

> "The requirement that a Negro seeking transfer must be well above the median of the white class he seeks to enter is plainly discriminatory. The board's explanation that this special requirement is imposed on Negroes to assure against any 'who would be failures' is no answer. The record discloses that no similar solicitude is bestowed upon white pupils. . . .
>
> "The federal courts have uniformly held that such unequal application of transfer criteria[2] is a violation [fol. 450] of the Negro pupils' rights under the Fourteenth Amendment."

Green v. *Board of Education of City of Roanoke*, 304 F. 2d 118, 123, citing *Jones* v. *School Board of City of Alexandria*, 4 Cir., 1960, 278 F. 2d 72, 77; *Dodson* v. *School Board of City of Charlottesville, Va.*, 4 Cir., 1961, 289 F. 2d 439, 443; and this Court's opinion in *Mannings* v. *Board of Public Instruction*, 5 Cir., 1960, 277 F. 2d 370, 374-375.

The opinion in the *Green* case also answers the contention made by appellees and accepted by the majority that an attack on the discriminatory manner of handling the plan must be by each individual student. See 304 F. 2d 118, 124. The discriminatory application of the plan can be challenged for the class as can the unconstitutionality of segregated schools.

Counsel for the School Board make the point, which seems somewhat persuasive to the majority, that in all

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[2] Throughout the discussion in the trial court and throughout the opinion of the majority, emphasis is placed on the fact that the same tests are given to white and Negro children, and that they are all subject to the same grading system. The significant point is not the tests, but the *use that is made of them*. Thus, it is a question of the application of criteria to the Negro student's grades that are not applied to the grades of the white student.

"regular transfers" [3] the transferring student was subjected to the same requirement that he meet the standard equal to the average of the school to which transfer was sought, and that he be subject to a personality interview. This, of course, does not meet the problem at all, because every white student would remain in a white school without having himself subjected to these testing or interview criteria [fol. 451] by reason of the fact that every student in the Atlanta schools below the "desegregated" grades goes to school under a dual system,[4] where white children go to white

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[3] The record shows that the only Negro applications for transfer to white schools that were considered were those submitted between May 1 and May 15 of each year. In addition to these there were many transfers made "informally" during the school year by white students among white schools, or by Negro students among Negro schools. The criteria above discussed were not applied to these informal transfers.

[4] While the trial court stated, "neither does the evidence show that defendants are maintaining a 'dual system of school attendance area lines,'" and the majority opinion says, "even if it may be said that there is a dual system in Atlanta, *and the evidence does not so disclose*" (emphasis added), both statements are incorrect. The Superintendent of Schools, who was the only witness, testified as follows on page 90 of the Record:

"Q. And by whom are these administrative lines drawn?

"A. By the area superintendent in cooperation with the school officials, local school officials.

"Q. And these lines serve to delineate the area for particular elementary schools?

"A. Yes, to the degree that it is necessary to balance one school's attendance.

"Q. Now, in the areas where the housing is mixed racially, that is, the areas where Negroes and whites live in the same area, these lines would overlap, so to speak, wouldn't they?

"A. Well, formerly they were drawn separately for white and Negro schools.

"Q. And how are they drawn now?

"A. They are drawn on the basis of the Pupil Placement Law under which we are operating. There has been no change in the elementary situation.

"Q. Now, you say the lines are drawn now pursuant to the Pupil Placement Laws. Is that a state law or is that the plan?

"A. That is the plan.

schools and Negro children go to Negro schools.[5] There was only one instance of a formal application of a white [fol. 452] girl seeking a transfer from one white school, which was about to be desegregated, to another white school, which thus far had not admitted any Negro students. This, the Board, the district court and this Court held to be an application made clearly outside the purview of the transfer plan, since it stated on the face of the application that the girl sought to transfer from a school which was about to be desegregated, *by reason of the fact of such desegregation.* Thus it is that no good faith application for transfer within the regular period has been made by any white student and none need be made in light of the freedom of transfer by the informal method and by reason of the fact that the "feeder" system from white lower grades automatically guarantees the passage of each student to a white upper grade.

Moreover, entirely beyond the question of whether the present Atlanta plan truly desegregates any grade of

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"Q. And you say the lines are drawn pursuant to that?

"A. The same lines that were in existence in 1960 are in existence at the present time.

"Q. I see.

"A. With variations that have been made. There have been no specific change in those lines.

"Q. And you still have separate lines which relate to the Negro schools and separate lines which would relate to the white elementary schools; is that right?

"A. Roughly, yes."

[5] The Superintendent testified at page 92 of the Record:

"Q. You have sort of a feeder system where certain elementary schools would feed into certain high schools?

"A. Yes.

"Q. And, of course, the Negro elementary schools would feed into one of these six Negro high schools?

"A. Yes.

"Q. And the white elementary schools would feed into one of these eighteen white or formerly white high schools?

"A. Right.

"Q. Is that the way these high school students are now assigned to the schools?

"A. The same way, except they are subject to transfer upon request."

school, which I think the record belies, there is the matter of timing which has heretofore come to this Court's attention in the Escambia County case and the Orleans Parish case already mentioned. In the case of Escambia County, the principal city of which is Pensacola, Florida, the Board had proposed a plan at the Court's direction, which the trial court had approved, providing for applications for transfers in all grades of school, such transfers to be applied to Negro and white students alike upon tests [fol. 453] uniformly applied. We concluded that until a start was made in abolishing a dual system of schools, whereby all white children went initially to white schools and all Negro students went initially to Negro schools, no plan of selective transfer from formerly Negro to formerly white schools would satisfy the requirements of deliberate speed under the *Brown* decision. In 306 F. 2d 862, at page 869, this Court said less than a year ago:

> "There cannot be full compliance with the Supreme Court's requirements to desegregate until all dual school districts based on race are eliminated. It is probably too late, without undue confusion, to require the elimination as to any grade of such dual district in time for the 1962 fall term. The plan should, however, provide for the elimination of all dual districts on racial lines at the earliest practicable time. If it appears too late for such elimination as to any grade in time for the 1962 fall term, then the plan should provide for such elimination as to the first two grades for the *1963 fall term*, and thereafter for such elimination as to at least one successive additional grade each school year."

Augustus v. *Board of Public Instruction*, 5 Cir., 1962, 306 F. 2d 862, 869.

In *Bush* v. *Orleans Parish School Board*, upon its last appearance here, 308 F. 2d 491, the *district court* had already required the Board of Education of Orleans Parish to modify its plan of permitting transfers under the State Pupil Assignment Law, which by that time had applied to [fol. 454] two grades of school, by requiring the complete

desegregation of the first grade of school beginning September 1962. The order required the abolition of the dual system of schools as to that grade. In an opinion that carefully considered the constitutional and administrative problems involved, *this Court added further requirements* to the effect that in September, 1964, the dual system shall be abolished for the first five grades, and that each year thereafter, as each succeeding higher grade is desegregated, the dual system shall be abolished contemporaneously therewith.

It is clear to me, as it must be to any who read and understand these two decisions by this Court, that if we accept the decision represented by the majority opinion in this case, the Court will have stepped backward from the position it has previously taken after long and mature deliberation, and that this Court will have deliberately required a prompter compliance with the Supreme Court's decision in New Orleans and Pensacola than is being required in Atlanta, a community in which all the evidence and the opinions of the district court and of the majority clearly indicate accommodation to the requirements of the Constitution can be expected to be made with a minimum of difficulty.

Enjoined as we are to give fresh consideration to the element of timing in these school cases by the Supreme Court's latent pronouncement on the subject in the *Watson* case, *supra*, and, following the *Watson* decision, in *Josephine Goss, et al.* v. *Board of Education, City of Knoxville, Tenn., et al.*, —— U. S. ——, 31 L. W. 4559, No. 217, [fol. 455] Oct. Term, 1962,[6] I cannot concur in a decision of this Court that takes a backward rather than a current, must less forward, step.

I would require the moderate rate of increase prayed for by appellants to the extent of desegregating the classes

[6] In construing language of a transfer plan for the schools of Knoxville, Tennessee, and of Davidson County, Tennessee, the Court said:

"Now, however, eight years after this decree was rendered and over nine years after the first Brown decision, the context in which we must interpret and apply this language to plans for desegregation has been significantly altered. Cf. Watson v. City of Memphis, supra."

to include the eighth and ninth grades in 1963, and the fifth, sixth and seventh grades in 1964. This is roughly parallel to what we required in *Bush*.

[fol. 456]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1962

No. 20,273

D. C. Docket No. 6298 Civil

VIVIAN CALHOUN, et al., Infants, by FRED CALHOUN, their father and next friend, Et Al., Appellants,

VERSUS

A. C. LATIMER, Et Al., Appellees.

Appeal from the United States District Court for the Northern District of Georgia.

Before: Rives, Lewis* and Bell, Circuit Judges.

JUDGMENT—June 17, 1963

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Vivian Calhoun, and others, Infants, by Fred Calhoun their father and next friend, and others, be condemned, in solido,

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* Of the Tenth Circuit, sitting by designation.

to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Rives, Circuit Judge, Dissents"

June 17, 1963

Issued as Mandate: September 26, 1963.

[fol. 457] [File endorsement omitted]

[fol. 458]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20,273

[Title omitted]

PETITION FOR REHEARING—Filed July 2, 1963

To: The Honorable Richard T. Rives and The Honorable Griffin B. Bell, Judges, United States Court of Appeals, Fifth Circuit, and The Honorable David T. Lewis, Judge, United States Court of Appeals, Tenth Circuit, sitting by designation as a Judge of the United States Court of Appeals, Fifth Circuit.

Appellants, by their undersigned attorneys, petition this Court for a rehearing of their appeal in this case before the Court *en banc* as permitted by Rule 25(a) of the Rules of this Court. As reasons therefor appellants show the following:

1. The instant appeal involves the important question of public school desegregation in the City of Atlanta, Georgia and was taken to this Court from the denial by the District Court of a motion for further relief which sought, in essence, to decrease from a period of 12 years to 7 years the period of transition from segregated to desegregated [fol. 459] schools. The motion further sought to require the reorganization of the dual school system into a unitary nonracial school system and, as the basis for assignment of students to school, a single nonracial school attendance area system in lieu of the pupil assignment plan presently

in effect. Further relief was also sought with respect to assignment of professional school personnel on a nonracial basis.

2. The appeal was argued on May 1, 1963 before a three-judge panel of this Court consisting of Judge Richard T. Rives, Judge Griffin B. Bell and Judge David T. Lewis of the Tenth Circuit sitting by designation. On June 17, 1963, the majority of the panel, consisting of Judges Lewis and Bell, affirmed the District Court's denial of the motion for further relief. Judge Rives dissented.

3. The decision of the majority is contrary to prior recent decisions of this Court in similar school desegregation cases. *Augustus* v. *Board of Public Instruction*, 306 F. 2d 862; *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491.

4. The majority opinion also fails to discuss the legal significance of undisputed facts in the record with respect to the presently existing dual school zone lines based on race for each school in the City of Atlanta.

5. The majority opinion also fails to give weight to the undisputed fact that Negro children seeking assignment to white high schools in grades desegregated, pursuant to the present desegregation timetable, are subject to a "personality interview" not required of white students and are subject to an analysis of their scores made on certain scholastic tests, given to white and Negro children alike, [fol. 460] in considering the eligibility of Negro children to transfer from Negro schools to white schools.

6. This is the first case decided by this Circuit since the Supreme Court in *Watson* v. *City of Memphis*, —— U. S. ——, No. 424, Oct. Term 1962 (decided May 27, 1963) and in *Goss, et al.* v. *Board of Education of the City of Knoxville*, —— U. S. ——, No. 217, Oct. 23, 1962 (decided June 3, 1963) admonished that the passage of time since its decision in the *Brown* case in 1954 required a revision of the standards of deliberate speed now applicable to the period of transition from a segregated to a desegregated school system.

7. The majority opinion also does not apply the criterion established in the *Goss* case, *supra*, with respect to determining whether a school desegregation plan or any feature thereof tends to retard or prolong desegregation or to perpetuate racial segregation in the public school system.

8. Neither the *Watson* case, *supra*, nor the *Goss* case, *supra*, was argued or briefed when this appeal was heard on May 1, 1963, since both of these cases were decided subsequent thereto.

9. The majority opinion does not secure or maintain uniformity or continuity in the decisions of this Court in similar cases.

10. In the light of the *Watson* decision the majority opinion in this case is now of major import and should be reheard by the court *en banc*.

[fol. 461] Wherefore, for all of the foregoing reasons, appellants respectfully pray that the entire Court rehear this appeal.

Respectfully submitted,

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[fol. 463]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20273

VIVIAN CALHOUN, et al., Infants, by FRED CALHOUN, Their father and next friend, et al., Appellants,

versus

A. C. Latimer, et al., Appellees.

Appeal from the United States District Court for the Northern District of Georgia.

OPINION ON PETITION FOR REHEARING—August 16, 1963

Before Rives, Lewis,* and Bell, Circuit Judges.

PER CURIAM: It is Ordered that the petition for rehearing filed in the above entitled and numbered cause be, and the same is hereby Denied.

[fol. 464] The record before the court in this case did not relate to any practices having to do with transfers and assignments for the 1963-64 school term. We referred to certain deficiencies found in the Atlanta plan on that record, and affirmed on the premise that such deficiencies would be adjusted by those having charge of the schools, or upon their failure, by the District Court.

The corrective action necessary in light of the deficiencies will entail the application of the plan in an even handed manner without regard to race to all assignments of pupils new to a school for admission in a desegregated grade in that school; and to all transfers whether formal, informal or otherwise. Personality interviews to determine probable success or failure in the schools to which transfer and assignment is sought may not be utilized where such a practice relates only to Negro pupils as was the case.

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* Of the Tenth Circuit, sitting by designation.

No standard requiring that a transferee score a grade on scholastic ability and achievement tests equal to the average of the class in the school to which transfer is sought may be utilized, nor may any scholastic requirement whatever be used where applied only to Negro students seeking transfer and assignment as was the case in Atlanta in the administration of the plan approved by the District Court. The opinion is modified to make it clear that this corrective action must apply to transfers and assignments for the 1963-64 school term to the extent, if any, that the practices giving rise to the deficiencies may have been continued in use.

Rives, Circuit Judge, I dissent.

[fol. 465]

IN UNITED STATES COURT OF APPEALS

ORDER DENYING REHEARING—August 16, 1963

[Title omitted]

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

"Rives, Circuit Judge, Dissents"

[fol. 466] Clerk's Certificate (omitted in printing).

[fol. 467]

SUPREME COURT OF THE UNITED STATES

No. 623, October Term, 1963

FRED S. CALHOUN, et al., Petitioners,

vs.

A. C. LATIMER, et al.

ORDER ALLOWING CERTIORARI—January 13, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is placed on the summary calendar. This case is set for argument immediately following No. 592.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 623

FRED S. CALHOUN, *et al.*,

Petitioners,

—v.—

A. C. LATIMER, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. .....

FRED S. CALHOUN, *et al.*,

Petitioners,

—v.—

A. C. LATIMER, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on June 17, 1963, rehearing of which was denied on August 16, 1963.

Citation to Opinions Below

The District Court's opinion denying the further relief sought and from which an appeal was taken to the court below is reported at 217 F. 2d 614 and printed in the Appendix hereto at page 1a.

Prior Findings of Facts, Conclusions of Law, Orders and Judgments of the United States District Court for the Northern District of Georgia, Atlanta Division (R. 13, 27,

55, 63, 69, 70, 302, 311),* reported at 188 F. Supp. 401 and 188 F. 2d 412 are not printed in Appendix hereto.

The opinions of the United States Court of Appeals for the Fifth Circuit, modifying and affirming the decision of the District Court and denying petitioners' petition for rehearing *en banc* are printed in the Appendix, *infra,* at 7a, 39a, and reported in 321 F. 2d 828.

Jurisdiction

The judgment of the Court of Appeals was entered on June 17, 1963. Application for rehearing *en banc* was denied on August 16, 1963 (A. 39a). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Question Presented

Respondents school authorities operate a biracial system which, under court order, now allows children to transfer to schools for the other race upon satisfying seventeen pupil assignment criteria, leaving the dual system otherwise intact. This limited opportunity to transfer has been given on a twelve year descending grade-a-year basis and is now enjoyed by children in 12th, 11th, 10th and 9th grades. In 1972 children will still have only this limited right. Does not *Brown* v. *Board of Education* impose upon respondents the affirmative duty to eliminate all racial classifications by reorganizing the schools into a unitary nonracial system and to do so now much more quickly than in twelve years?

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* (R. —) refers to Volumes 1-3 of the mimeographed record; (A. —) refers to the Appendix herein.

Constitutional Provision Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Statement

As early as 1955, Negro parents in Atlanta began petitioning local school authorities to desegregate Atlanta's public school system in compliance with this Court's decision in *Brown* v. *Board of Education of Topeka*, 347 U. S. 483 (1954) (R. 6, 306). Today, almost ten years after this Court's holding that racial segregation in public education denies Negro children equal educational opportunities, Atlanta's segregated school system is still essentially intact.

Atlanta now has a total public school population of approximately 106,000—approximately 57,500 whites and 48,000 Negroes. Although Negroes constitute 45% of the total, they have been allotted only 33% of the school buildings and 40% of the teachers and principals; they suffer serious overcrowding in certain schools and higher pupil-teacher ratios (R. 86, 143, 144, 169, 199, 200).

Approximately four years after *Brown*, on January 11, 1958, petitioners, parents of Negro school children, brought suit in a United States District Court to secure compliance.

More than three years later, in September, 1961, school desegregation began with the admission of 10 Negro students in grades eleven and twelve to four formerly all-white high schools (R. 100, 138).[1] In September, 1962, 44

[1] The District Court refused to require school authorities to commence desegregation in May, 1960 because it was of the opinion that no action should be required until the Georgia Legislature made it

more Negro students were admitted to seven formerly all-white high schools in grades twelve, eleven and ten (R. 139-141, 188).[2]

They were admitted pursuant to a desegregation plan approved by the District Court on January 20, 1960 (R. 55). This plan provides for grade-a-year desegregation beginning with the 12th grade and proceeding, in reverse, a grade a year. However, in order for any desegregation to take place in any grade, applications by individual children must be made between May 1st and 15th (R. 50) and must be acted upon according to 17 pupil assignment criteria (R. 48-49).[3] The plan maintains unimpaired the dual school system (R. 88-91, 106-109). All racial assignments previously made were frozen unless and until a transfer in accordance with the plan is granted (R. 50). In short, a person desiring desegregation may apply when the reverse stair-step operation of the plan reaches his or her grade level. But except as to that individual no other change can be made.

Between May 1st and 15th, 1961, 129 Negro students in grades eleven and twelve returned application forms for

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possible for Atlanta to proceed without having its schools closed. Because of this delay, the court ordered the school authorities to desegregate the 12th and 11th grades pursuant to the court-approved plan upon its commencement in 1961 (R. 63-69).

[2] In September, 1963, a total of 145 Negro students were in formerly all-white high schools in grades 12, 11, 10 and 9. Southern School News, Sept. 1963, p. 8, cols. 1 and 5. Twenty-nine had been previously admitted.

[3] The 17 criteria are identical with those of the Alabama pupil assignment law upheld as constitutional on its face in *Shuttlesworth* v. *Birmingham Board of Education*, 358 U. S. 101 (1958), affirming 162 F. Supp. 372 (N. D. Ala. 1958). Here, of course, the case involves *application* of such a plan, not its surface plausibility.

transfer to white high schools (R. 95, 137-139).[4] From these school authorities admitted 10 to 4 formerly all-white high schools. The following year, 44 were selected out of 266 applicants (R. 139-141, 188).

The pupil assignment criteria were applied only to those applicants, all Negroes, seeking transfer during the May 1st to 15th period to schools attended by pupils of the opposite race. All other applications for transfer, whites to white schools and Negroes to Negro schools, were considered "informal" transfers and were made throughout the school year (R. 189-194, 161-162).

April 30, 1962, after the first year of operation of the plan, petitioners moved the District Court for further relief (R. 77-84). Petitioners claimed that the plan, which had been approved over their numerous objections, had not resulted in desegregation (R. 81-82). They prayed for not only a new plan to speed up desegregation but for one providing prompt reassignment and initial assignment of all students on some reasonable nonracial basis, e.g., the drawing of a single set of attendance area lines for all schools, without regard to race, to replace the present dual scheme of school attendance area lines for Negro and white schools. Petitioners claimed the *Brown* case contemplated the reassignment of teachers on a nonracial basis and the elimination of all other racial distinctions in the operation of the school system (R. 81). In short, petitioners sought an integration of the dual school system into a unitary nonracial system with greater speed. Petitioners' motion for further relief was finally denied on November 15, 1962 on the ground that the plan "is eliminating segregation." The

[4] One white student sought a transfer from Northside High School (white) to Dykes High School (white) because Northside had been designated as a school to which Negroes would be admitted. The white student's application was denied (R. 138, 187).

teacher assignment issue was indefinitely deferred (R. 291). This denial of further relief was flatly affirmed by the Court of Appeals for the Fifth Circuit in a two-to-one decision (A. 7a),* Judge Richard T. Rives, dissenting.

The District Court's refusal to grant any further relief was squarely affirmed by the majority on the ground that certain deficiencies in the plan "would be adjusted by those having charge of the schools, or upon their failure, by the District Court" (A. 25a). Subsequently, upon denial of rehearing, the majority issued a further opinion describing corrective action to eliminate some of the discriminatory characteristics of the plan. The majority stated that this corrective action "must apply to transfers and assignments for the 1963-64 term to the extent, if any, that the practices giving rise to the deficiencies may have been continued in use" (A. 40a). The deficiencies which the majority wrote should be corrected were:

> 1. The plan must now be applied "in an even handed manner without regard to race to all assignments of pupils *new* to a school for admission in a *desegregated* grade in that school. (Emphasis added.)
>
> 2. The plan must be applied to *all transfers*, formal and informal. (Emphasis added.)
>
> 3. Personality interviews, if utilized, may not be given only to Negro students seeking assignment or transfer.
>
> 4. No transferee may be required to score a grade on scholastic ability and achievement tests equal to the average of the class in the school to which transfer is sought.

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*The Court consisted of Judges Griffin B. Bell and David T. Lewis of the 10th Circuit, sitting by designation, as well as Judge Rives. Petition for rehearing was denied on August 16, 1963, Judge Rives again dissenting.

> 5. No scholastic requirement may be used which is limited to Negro students seeking transfer or assignment.

The petition for rehearing was denied August 16, 1963, less than three weeks before the opening of school. However, assuming the suggested corrections were made, the practical results were the admission of approximately 116 more Negro students to 10 of the 16 formerly all white high schools in grades 12, 11, 10, and 9 out of a total Negro school population of approximately 48,000, with no white pupils, who number at least 57,500, admitted to any of the 5 Negro high schools.[6] In short, the majority opinion required no speedup in the desegregation process and left undisturbed all of the major props on which the dual system rests. The majority left intact: 1) all existing racial assignments in the high schools in grades 10-12; 2) the "feeder" system whereby certain Negro elementary schools (grades 1-7) "feed" certain Negro high schools (grades 8-12) and the same with respect to white elementary and high schools, although the opinion seems to suggest the plan be applied to all assignments at the point (grade 8) where the feeder system takes hold; 3) all existing and future racial assignments in the elementary schools made pursuant to the dual scheme of attendance area lines; 4) all teacher assignments which are admittedly based on race; 5) the five administrative areas plan whereby all Negro schools are in Area One under the jurisdiction of a Negro Area Supervisor;[7] and 6) the grade-a-year feature of the plan.

In other words, Atlanta still has, and for the future, will have segregated schools from which Negro children must

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[6] See footnote 2, *supra*.

[7] R. 107, 145, 171.

seek escape by taking an administrative initiative. Isolated children may thereby get into "white" schools. The segregated system survives but for this token accommodation.

Reasons Relied On for Allowance of the Writ

The Decision Below Approving Respondents' Desegregation Plan Conflicts With Prior Decisions of the Fifth and Other Circuits and With the Applicable Decisions of This Court.

1. Circuit Judge Richard T. Rives dissented below not only on the ground the majority opinion disregarded this Court's admonition in *Watson* v. *City of Memphis*, 373 U. S. 526 and *Goss* v. *Board of Education of the City of Knoxville*, 373 U. S. 683, but also because that opinion represented "a step backward" for the Fifth Circuit which previously had required other school districts, New Orleans, Louisiana, *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491 (5th Cir. 1962) and Pensacola, Florida, *Augustus* v. *Board of Public Instruction*, 306 F. 2d 862 (5th Cir. 1962), to abolish the dual school system.

In *Watson*, Memphis attempted to extend to public recreation the deliberate speed concept of *Brown* v. *Board of Education of Topeka*, 349 U. S. 294 (1955). In holding the concept inapplicable to public recreation, this Court warned that the concept did not "countenance indefinite delay" in bringing about a transition from a segregated to a desegregated school system (at p. 534). The Court specifically admonished that the passage of time since 1954 has considerably altered the type of plans which would now satisfy the requirement of "all deliberate speed." However, despite the clear teaching of *Watson*, the majority below approved, in 1963, eight years after this Court's decision requiring "deliberate speed," a grade-a-year plan which

when completed will leave Atlanta with a system of tokenism based upon a foundation of fundamental segregation.

The majority approved Atlanta's grade-a-year plan despite the fact that the Fifth Circuit, itself, had warned in *Davis* v. *Board of School Commissioners of Mobile County, Alabama*, 318 F. 2d 63 (5th Cir. 1963), that ". . . the amount of time available for the transition from segregrated to desegregated schools becomes more sharply limited with the passage of the years since the first and second *Brown* decisions" (at p. 64).

Moreover, the Fifth Circuit previously had rejected plans which provided for desegregation on a grade a year basis. *Boson* v. *Rippy*, 285 F. 2d 43 (5th Cir. 1960). There the Fifth Circuit ruled in approving a grade a year plan as a start: "In so directing, we do not mean to approve the twelve-year, stair-step plan 'insofar as it postpones full integragtion'" (at p. 47).

The Third Circuit, as early as 1960, rejected the notion that it would take 12 years to desegregate public schools throughout the State of Delaware. It required an acceleration of the transition period in that state. *Evans* v. *Ennis*, 281 F. 2d 385, 389 (3rd Cir. 1960).

The Sixth Circuit having originally approved a twelve-year plan for a school board which commenced desegregation in 1956, *Kelley* v. *Board of Education of City of Nashville*, 270 F. 2d 209 (6th Cir. 1959), subsequently rejected a similar plan commencing a grade-a-year in 1962. *Goss* v. *Board of Education*, 301 F. 2d 164 (6th Cir. 1962), reversed on other grounds 373 U. S. 683 (1963).

Twelve year plans to commence in 1962 also have been rejected emphatically by the Fourth Circuit. In *Jackson* v. *School Board of City of Lynchburg, Virginia*, 321 F. 2d 230 (4th Cir. 1963), after reviewing this Court's decision in

Watson v. *City of Memphis*, the Fourth Circuit ruled: ". . . the 'grade-a-year' plan, promulgated by the Lynchburg School Board, for initial implementation eight years after the first Brown decision, cannot now be sustained" (at p. 233).

The majority opinion below, therefore, clearly conflicts with the prior decisions of the Fifth Circuit, itself, and the decisions of three other circuits with respect to the length of time which should now be allowed Atlanta in which to desegregate its schools.

As the Fifth Circuit noted in *Boson* v. *Rippy*, *supra*, the District Court's approval of the 12 year plan for Atlanta in January, 1960, which went into effect in September, 1961, must be viewed as no more than the approval of a plan for initiating a start toward desegregation. That these petitioners did not appeal from that approval in 1961, as Judge Rives wrote, does not preclude them—a start having been made—from seeking full compliance and seeking to set aside a plan which demonstrably did not result in the desegregation of the Atlanta schools, and which had been administered to discriminate against Negroes although constitutional on its face. See, *Shuttlesworth* v. *Board of Education of the City of Birmingham*, 358 U. S. 101 (1958) affirming 162 F. Supp. 372 (N. D. Ala. 1958).

2. But more invidious than the twelve-year feature is the denial of rights which will persist after twelve years are gone. The majority ignored the fact that *Brown* struck down the *dual school system*. It did not merely afford to Negro pupils an opportunity to apply and to be subjected to a number of criteria to determine their eligibility and suitability for admission to "white" schools within the segregated framework.

In *Brown* v. *Board of Education of Topeka*, 347 U. S. 483 (1954), 349 U. S. 294 (1955), *Cooper* v. *Aaron*, 358 U. S. 1

(1958) and *Watson* v. *City of Memphis, supra*, this Court made clear that the time allowed southern school authorities for affording Negro pupils their constitutional rights was tolerable only because there is involved in these cases the problem of transition from a segregated to a desegregated school system. These opinions speak in terms of transforming school "systems" and the holding in *Brown* is that racial segregation in "public education" has no place. 347 U. S. 483, 495. In *Cooper* v. *Aaron, supra*, at page 7, this Court directed the District Courts again to require " 'a prompt and reasonable start toward *full compliance*,' " and to "take such action as was necessary to bring about the *end* of racial segregation in the *public schools*. . . ." (Emphasis added.) There was clearly never any thought that the *Brown* decision was a license to continue the dual school systems while affording to Negro children the opportunity to apply for transfers to "white" schools within the "separate-but-equal" structure. The structure, itself, was doomed.

The Fifth Circuit in a prior decision, *Potts* v. *Flax*, 313 F. 2d 284 (5th Cir. 1963), had made this abundantly clear. There a Negro claimed to have brought suit to desegregate the schools on behalf of his children alone and denied that he represented a class. The court ruled that even where a single Negro sues the relief which must necessarily be granted under *Brown* involves relief for Negroes as a class. See also *Holland* v. *Board of Public Instruction*, 258 F. 2d 730 (5th Cir. 1958). In addition, the Fifth Circuit in prior decisions specifically had required elimination of the dual school system, *Bush* v. *Orleans School Board, supra* and *Augustus* v. *Board of Public Instruction, supra*, by directing elimination of dual school attendance areas for Negro and white schools. The Fourth Circuit in *Jones* v. *School Board of the City of Alexandria*, 278 F. 2d 72, 76 (4th Cir. 1960) and the Sixth Circuit in *Northcross* v. *Board of Edu-*

cation of the City of Memphis, 302 F. 2d 818, 823 (6th Cir. 1962) have also imposed such a requirement. In *Northcross* the court said:

> "Minimal requirements for nonracial schools are geographic zoning, according to the capacity and facilities of the buildings and admission to a school according to residence as a matter of right. 'Obviously, the maintenance of a dual system of attendance areas based on race offends the constitutional rights of the plaintiffs and others similarly situated and cannot be tolerated.' *Jones* v. *School Board of the City of Alexandria, Virginia*, 278 F. 2d 72, 76, C. A. 4." (At p. 823).

The majority opinion does not require Atlanta to abolish dual school attendance areas. As Judge Rives points out in his dissenting opinion, both the District Court and the majority below overlook the record with respect to present existence of a dual system of school attendance area lines in Atlanta (A. 32a-33a, footnote 4).

Since the Fifth Circuit previously had ordered New Orleans and Escambia County, Florida to abolish dual attendance area lines, it is obvious that the majority opinion not only represents a step backwards for that circuit which had recognized that the *Brown* case required the reorganization of the dual school system into a unitary nonracial system but conflicts with decisions of the Fourth and Sixth Circuits which also require reorganization. *Jones* v. *School Board of the City of Alexandria, supra* and *Northcross* v. *Board of Education of the City of Memphis, supra.*

3. The decision below also conflicts with the decision of the Sixth Circuit in *Northcross* v. *Board of Education City of Memphis*, 302 F. 2d 818 (6th Cir. 1962) enjoining use of the Tennessee Pupil Assignment Law as a vehicle for desegregating the public school system of Memphis which,

like Atlanta's plan, requires Negroes to apply for that to which they are already entitled. The Atlanta plan incorporated 17 criteria of the Alabama Pupil Placement Law which had been held constitutional on its face by this Court with the admonition that it might subsequently be held unconstitutional with respect to its administration. *Shuttlesworth* v. *Board of Education of the City of Birmingham*, *supra*. The Sixth Circuit has barred use of Tennessee's Pupil Assignment Law as a plan of desegregation whereas the opinion below, in effect, adopts the Alabama Pupil Placement Law as a plan of desegregation.[8] Again, the Fifth Circuit had previously ruled that the Florida Pupil Assignment Law, standing alone, was not a plan of desegregation. *Gibson* v. *Board of Public Instruction*, 272 F. 2d 767 (5th Cir. 1959) and 246 F. 2d 913 (5th Cir. 1957) and *Augustus* v. *Board of Public Instruction*, 306 F. 2d 862 (5th Cir. 1962).

Petitioners here had challenged by their motion for further relief the application of the Atlanta plan. Petitioners claimed first that the plan had not been used to bring about desegregation but had been used to maintain segregation. Admission of 10 Negroes out of 129 in September 1961 and 44 out of 266 in September 1962 pursuant to criteria applied only to these Negro applicants seeking transfer to white schools, established beyond question the discriminatory application of the plan. The majority did not direct the District Court to enjoin discriminatory application of the plan. Instead, it ruled that petitioners should first have complained of their grievances with respect to the administration of the plan to the Board and, upon the Board's failure to remedy same, appeal to the District Court. Even upon rehearing the majority did

[8] The Tennessee and Alabama Pupil Assignment Laws are essentially identical in all material respects. Compare Tenn. Code Ann. §§ 49-1741 to 49-1763 with Code of Ala. (Recompiled) §§ 61(1) to 61(11).

not direct the District Court to enjoin discriminatory application of the plan and again assumed that the corrective action which it outlined in its opinion would be taken by the Board, and if not, that petitioners would return once again to the District Court and again seek an end to discriminatory application of the plan.

Petitioners say, however, that Atlanta, as this Court warned in the *Shuttlesworth* case, having administered a pupil assignment plan in an unconstitutional manner, should have been enjoined from further use of the plan. *Bailey* v. *Patterson*, —— F. 2d —— (5th Cir., Sept. 24, 1963, not yet reported). Atlanta has demonstrated by its failure to apply all criteria to all students in even a single grade the manifest impracticability for a school board the size of Atlanta to administer any such onerous pupil assignment plan.

The majority opinion, therefore, conflicts not only with the opinion of the Sixth Circuit in the *Northcross* case barring use of a pupil assignment law as a vehicle for desegregation but conflicts with the clear warning of this Court in the *Shuttlesworth* case concerning unconstitutional administration of a pupil assignment law.

4. Another major prop of the segregated school system which the majority opinion leaves standing is the segregated staff. In Atlanta, as elsewhere, the schools are segregated not only because in every seat in a Negro school is a Negro child but in front of every class is a Negro teacher. Atlanta goes further, as do other school districts, in placing all Negro schools under the direction of a Negro Supervisor (R. 107, 145, 171).

The District Court in this case postponed indefinitely consideration of the assignment of Negro teachers on a nonracial basis. Again, such deferment, *per se*, is contrary to this Court's admonition in *Watson* and *Goss* v.

Board of Education of City of Knoxville, 373 U. S. 683, that the time has come for full compliance with this Court's decision and the end of built-in devices for maintaining segregation. Contrary to the opinion of this Court and other circuits, clearly indicating that the relief to be afforded in these cases encompasses the entire school system, including personnel, *Brown* v. *Board of Education of Topeka*, 349 U. S. 294, 300-301 (1955); *Northcross* v. *Board of Education of the City of Memphis*, *supra*, at p. 819; *Jackson* v. *School Board of the City of Lynchburg*, *supra*, at p. 233, the court below postponed without day consideration of this problem.

5. The additional vice of the opinion below is that unreversed the majority opinion means that soon another whole generation of Negro students will graduate from Atlanta's "separate but equal" public school system with the promise of equality made in 1954 unredeemed. As this Court said in *Watson* v. *City of Memphis*, *supra*, at p. 535: "The rights here asserted are, like all such rights, *present* rights; they are not merely hopes to some *future* enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled." Not only is the result of the majority opinion inconsistent with the great promise of equality envisioned by this Court's 1954 decision, but the majority opinion so clearly guarantees the continuation of "separate but equal" that three other major school districts, Savannah, Georgia, Birmingham, Alabama and Mobile County, Alabama, ordered to commence desegregation in September 1963, by the Fifth Circuit, pending appeal, immediately adopted the Atlanta plan which had just been approved. As a result, Savannah admitted 21 Negro students to the twelfth grade out of a school population of 24,013 whites and 15,336 Negroes.

Birmingham admitted 5 to the twelfth grade out of a school population of 37,500 whites and 34,834 Negroes. Mobile County admitted 2 to the twelfth grade out of a school population of 47,247 whites and 30,020 Negroes.[9] The majority opinion thus has established the pattern of the future.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[9] See Southern School News, Sept. 1963, p. 2, col. 3; p. 3, cols. 2-4; p. 8, col. 1; *id.*, Oct. 1963, p. 10, col. 3.

APPENDIX

Opinion of Hooper, District Judge

Nov. 15, 1962.

UNITED STATES DISTRICT COURT

N. D. GEORGIA—ATLANTA DIVISION

Civ. A. No. 6298.

VIVIAN CALHOUN, *et al.*

—v.—

A. O. LATIMER, *et al.*

HOOPER, *District Judge.*

STATEMENT OF THE CASE.

This Court on January 20, 1960 approved a Plan of desegregation proposed by defendant Atlanta Board of Education. Details of that Plan may be obtained by reference to *Calhoun* v. *Members of Board of Education*, D. C., 188 F. Supp. 401 and D. C., 188 F. Supp. 412. On September 13, 1960 the Court provided the Plan in question should begin in September, 1961 and apply to the eleventh and twelfth grades of the schools. The Plan has been in operation for the two school years beginning September, 1961 and September, 1962 respectively, and pursuant thereto fifty-three Negro students have transferred from schools previously Negro schools to schools previously all white schools. This was done peaceably and without violence, largely due to the unusually effective methods em-

ployed by the Mayor of Atlanta, its Chief of Police, and all groups working in concert with them.

The Plan adopted by this Court on January 20, 1960 was the Plan which was adopted upon the insistence of plaintiffs in order to comply with the mandates of the United States Supreme Court and other courts, to the effect that discrimination should cease and that compulsory segregation should no longer be enforced in the Atlanta Public Schools.

It is significant to note that the Plan in question at the time of its adoption met with the approval of these plaintiffs. An appeal from this Order of Court was filed but upon motion of the plaintiffs was permitted to be dismissed by the Court of Appeals.

GROUNDS OF THE MOTION.

A large part of the motion filed April 30, 1962 is couched in vague and indefinite terms and is largely a repetition of charges made against defendants concerning discrimination before the Plan had been put into operation. Thus plaintiffs seek an injunction against defendants "from continuing to maintain and operate a segregated bi-racial school system," from "continuing to assign pupils to the public schools upon the basis of race and color," from "continuing to designate schools as Negro or white," from maintaining "racially segregated extracurricular school activities."

Complaint is also made of alleged assigning of teachers and others on basis of race and color and maintaining a dual system of school attendance area lines.

[1, 2] There is no disputing that discrimination had existed prior to the Order of this Court of January 20, 1960, and that the Order of that date was designed to elimi-

nate the discrimination over a period of years. Even plaintiffs' counsel upon the original trial disclaimed any purpose of seeking to have "wholesale integration." The only question then involved was the plan by which discrimination could be eliminated; a Plan was carefully prepared and adopted and no appeal taken. The Plan is eliminating segregation, but until it has completed its course there will of course still be areas (in the lower grades) where segregation exists. The Court is therefore at a loss to see how anything could be accomplished at this time by "an order enjoining defendants from continuing to maintain and operate a segregated, bi-racial school system," for the Court has already taken care of that in its decree of January 20, 1960. There is no evidence that defendants are "continuing to designate schools as Negro or white," nor that they are maintaining "racially segregated extra-curricular school activities."

The assigning of teachers and other personnel on the basis of race and color is not now passed upon but is deferred (as other courts have done) awaiting further progress made in the desegregation of the students.

[3] The objection to said Plan of Desegregation which most impressed this Court related to the charge that it caused discrimination between a Negro transferring to a grade in a previously white school, in that certain tests were required for the transfer to which the white students promoted to the same grade were not subjected. At the hearing of this motion, however, it appeared without dispute that defendants beginning in September 1962 had ceased using the tests required of transfers as used theretofore. In lieu thereof as of September 1962 the school authorities gave to all pupils in the school system a nationally recognized test known as the "School and College Abil-

ity Test" (SCAT). (See Transcript, p. 22.) Testimony of Superintendent John Letson shows that this test was given to all students, Negro and white, and this testimony was not disputed. Proximity of the pupil to the school involved was also considered by the Board, as were certain other criteria contained in the Plan approved by this Court on January 20, 1960.

[4] Neither does the evidence show that defendants are maintaining a "dual system of school attendance area lines." Proximity to the schools in question is a factor considered by the defendant Board. It is not shown that defendants are acting arbitrarily in connection with the assignment of pupils in relation to their distance from the school. It does appear that area lines (where such exist) are sometimes changed for the sole purpose of relieving over-crowded conditions in the schools.

PLAINTIFFS' PROPOSED NEW PLAN.

[5] The original motion filed by plaintiffs on April 30, 1962 made certain attacks on the Plan of Desegregation established January 20, 1960, but did not make any complaint that the Plan contemplated too much time for the completion of the desegregation. Not until the Court required the parties to file Findings of Fact and Conclusions of Law did it occur to plaintiffs to make any effort to speed up the transition. However, on July 20, 1962 plaintiffs filed a paper entitled "Plaintiffs' Proposed Plan of Desegregation," which does bear some similarity to the Plan adopted by the Court on January 20, 1960, already in operation for a period of two years. However, the Proposed Plan accelerates the dates to which the various grades might be integrated (which in September 1963 include the ninth, tenth,

eleventh and twelfth grades) so that in September 1965 "all pupils and personnel in grades one, two and three shall be desegregated in the same manner in which the other grades are desegregated, as set forth above."

This suggestion by plaintiffs' counsel that the Court summarily speed up the Plan already adopted without any evidence to show that the new Plan is practicable or feasible, is no doubt inspired by one or more recent decisions by appellate courts which do summarily establish a Plan of Desegregation. In all such instances, however, that action was taken by appellate courts because the school authorities in question had not proposed a Plan, or the district judge in question had not ordered a Plan. This Court finds no precedent for a trial judge summarily changing and speeding up a Plan, already in operation for two years, without some facts or circumstances requiring the same.

When this Court approved the Plan on January 20, 1960 many local conditions mitigating against a more speedy transition were considered (see 188 F. Supp. 401), these factors included the following:

There were in Atlanta 116,000 pupils, of which approximately forty per cent, or some 46,400, were Negroes. There was a rapid influx of children of school age into the city and a shortage of some 580 class rooms, many classes then being held in churches and other buildings, and many having double sessions. Other problems confronted the School Board, caused by slum clearances and changes in residential patterns, to which may now be added complications arising out of large tracts of land being condemned for expressways.

The United States Supreme Court has ordered that segregation be eliminated "with deliberate speed," and has invested the trial judges in the first instance with some

discretion, bearing in mind all local conditions, as to the timing of a Plan of Desegregation. The Plan heretofore approved by this Court, and now under attack, has been administered fairly and in good faith by defendant Atlanta Board of Education, the local authorities have given utmost cooperation in maintaining law and order, and the number of students being transferred each year from previously designated colored schools to previously designated white schools is increasing at an accelerated rate each year as the lower grades are reached. This Court feels that the public interests demand that the Plan now in operation be continued according to its terms and not be summarily displaced by the new Plan of Desegregation proposed by plaintiffs.

For reasons set forth above plaintiffs' motion for further relief and plaintiffs' motion to adopt a Proposed New Plan of Desegregation are denied.

Opinion of Bell, Circuit Judge

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20273

VIVIAN CALHOUN, *et al.*, Infants, by FRED CALHOUN, their father and next friend, *et al.*,

Appellants,

—versus—

A. C. LATIMER, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

(June 17, 1963)

Before RIVES, LEWIS* and BELL, *Circuit Judges.*

BELL, *Circuit Judge*:

I.

This appeal from an order denying a motion for further relief brings up for review, for the first time,[1] the plan for the desegregation of the Atlanta school system. The plan

* Of the Tenth Circuit, sitting by designation.

[1] Appellants filed notice of appeal from the order of the court dated March 9, 1960 refusing to make the plan effective for the school term 1960-61 but dismissed the appeal.

was formulated pursuant to court order, and approved by the court on January 20, 1960. It became effective on May 1, 1961 for the school term 1961-62 beginning in September 1961. It was applied to the twelfth and eleventh grades at that time for the purposes of desegregation, to the tenth grade beginning with the 1962-63 school term, and will be applied to the ninth grade beginning with the 1963-64 school term. It is to be applied progressively to the next succeeding grade each school term thereafter until all grades in the school system have been included, and desegregated.

The sequence of events in this case began with the filing of a complaint on January 11, 1958 by appellants seeking the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution; *Brown* v. *Board of Education of Topeka*, 1954, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873, having proscribed racial discrimination in public education. The District Court had first enjoined appellees, members of the Board of Education of the City of Atlanta, and the school superintendent, from enforcing and pursuing the policy, practice, custom, and usage of requiring or permitting racial segregation in the operation of the schools, and from engaging in any and all action which limited or affected admission to, attendance in, or the education of the appellant children, or any other Negro children similarly situated, in the schools on the basis of race. A reasonable period of time was allowed within which to comply with the order, and for bringing about a transition to a school system not operated on the basis of race. The school board was required to present a plan on or before December 1, 1959 designed to bring about compliance with the order, and which would provide for a prompt and reasonable start toward desegregation of the public schools of Atlanta, and a systematic and effective method for achieving such desegregation with all deliberate speed.

A plan was submitted, contingent upon the enactment of statutes by the State of Georgia permitting the same to be put into operation. It provided procedures of uniform application for the assignment, transfer, or continuance of pupils among and within the schools of the system. The plan was largely modeled upon the placement law approved as constitutional on its face in *Shuttlesworth* v. *Birmingham Board of Education*, N. D. Ala., 1958, 162 F. Supp. 372, affirmed, 358 U. S. 101, 79 S. Ct. 221, 3 L. Ed. 2d 145. It was, however, amended in various respects by court order before final approval to meet some of the objections of appellants. There was also objection to the plan being contingent upon changes in the state laws which then required segregated schools, under penalty, among others, of loss of state financial support. The court limited the contingency to one year and included two grades in the plan for the first year of its operation. It was to be invoked for the 1961-62 school year in any event. See *Calhoun* v. *Members of Board of Education, City of Atlanta*, N. D. Ga., 1959, 188 F. Supp. 401, 188 F. Supp. 412.

II.

The Georgia laws were changed, obviating harm to public education, and making it possible for the plan of the school board to proceed on schedule. Schools were no longer classified as white or Negro, but the plan did contemplate that each child would continue in the school to which assigned for the then present school term unless and until transferred, on request, to another school. Applications for transfer were to be filed between May 1 and May 15 in each school year. This was the method of transition agreed upon rather than some other plan requiring reassignment by school officials. Any child was free to seek transfer to the grades within the plan.

Opinion of Bell, Circuit Judge

Some three hundred Negro children and one white child obtained application forms for transfer for the 1961-62 term. Only one hundred and thirty of these were actually filed by Negro children. Ten of these were granted and reassignment was made to the eleventh and twelfth grades of formerly white schools. The transfer sought by the white child out of one of these schools because Negroes were to be admitted was denied. See *Stone* v. *Members of the Board of Education City of Atlanta*, 5 Cir., 1962, 309 F. 2d 638. At this time there were one hundred thirteen elementary schools, grades one through seven, and twenty-two high schools, grades eight through twelve, in Atlanta. There were no junior high schools. Forty-one of the elementary schools were all Negro in attendance while seventy-two were all white. This is still true since the plan has not reached the elementary grades. There were five all Negro and seventeen all white high schools. This latter number was reduced to thirteen by the transfer of the ten Negro students. Forty-four additional Negro students, out of some two hundred sixty-six requesting transfer, were transferred, to white high schools for the 1962-63 term resulting in the desegregation of seven additional formerly all white schools. The result to date is that there are eleven integrated high schools in Atlanta, five all Negro high schools and six all white high schools.

Special intelligence tests were given those students seeking transfer under the plan in 1961, but this requirement was abandoned prior to 1962; thus, our discussion will center on the practices and procedures required under the plan for 1962. Only a few of the seventeen factors or criteria set out in the plan were used. A scholastic ability and achievement test routinely given to every child in the grades in question in the school system was used in considering the

applications. The standard used was that the transferee had to score a grade at least equal to the average of the class in the school to which transfer was requested. Such a requirement is, of course, discriminatory *per se* when applied only to Negro students. Proximity of the residence of the student to the school in question, subject to variation for educational reasons, and also the reasons given on the application for the requested transfer were other factors used. Each student was also given a personality interview by school officials to determine probable success or failure in the new school.[2]

When the plan became effective, all students in the grades to be segregated were already assigned to high schools. Thus, the plan to date encompasses only those students wishing to transfer, and new students entering a school for the first time in the desegregated grades. However, it has not been applied to new students, nor to those students being transferred at times other than during the period May 1 to May 15 under the plan. Transfers, other than during this period, not substantial in number, are known to the school board as informal transfers, and are to be distinguished from transfers under the plan, called formal transfers.

There is no evidence that the criteria applied in informal transfers were racially discriminatory as among informal transferees, but they were apparently different from the criteria applied in formal transfers. The school superintendent testified that the criteria applied in formal transfers

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[2] Such solicitude has rightly been condemned where applied only to Negroes, *Green* v. *School Board of the City of Roanoke, Virginia*, 4 Cir., 1962, 304 F. 2d 118, although it would appear, where done in good faith, and there is no contrary contention here, to lend itself, at least in the early days of transition, to assuring the success of a plan.

included the reason given by the student for requesting transfer, tests that were a part of his permanent record, grades, teacher opinion and educational judgment as to whether the request, for these reasons, would be educationally justified. Also considered was proximity of residence to school and the capacity of the school. The difference in the requirements for formal and informal transfers, in the main, was that no personality interview was required for informal transfers, nor does it appear that the standard of scholastic ability basis was the same.

The form used in requesting transfers as well as the plan itself is designed to apply in the admission and assignment procedure, as well as in the transfer procedure. The District Court said in this regard:

> "Essentially the Plan contemplates that all pupils in the schools shall, until and unless transferred to some other school, remain where they are, all new and beginning students being assigned by the Superintendent or his authority to a school selected by observance of certain standards as set forth in the proposed Plan." 188 F. Supp. 401, 406, *supra*.

Not one of the Negro applicants for transfer has complained individually to the District Court at any time. The case is still proceeding as a class action. Both appellants and the school board were satisfied to rely largely on the testimony of the school superintendent. His testimony in substance was that the board was abiding the letter and the spirit of the plan approved by the court. Pupils were assigned to schools they attended the previous year in order to establish a base from which they were free under the plan to request a transfer. He contended that the Atlanta school system was desegregated and pointed out that all mention

of race had been removed from the school directory, official reports, building programs, and all other classifications. Schools are no longer designated as white or Negro. Negro students assigned to previously all white schools participated in both regular and extra-curricular activities, including honor banquets, clubs and other activities on the basis of free choice, and their parents attended Parent-Teacher Association meetings, athletic events, graduation programs and other school activities free of racial discrimination. School events to which the public is invited are not segregated, nor are meetings of professional committees.

He testified that there were no attendance areas or zone lines established by the board, but that lines are sometimes drawn administratively between schools in an attempt to equalize class loads. There was no evidence before the court that they were based on race. The Atlanta system is divided into five sub-areas with an assistant superintendent in charge of each area. One sub-area has only all Negro schools in it, but there is no evidence of white children living in it, or that it resulted from gerrymandering.[3]

Another pertinent fact is that there is overcrowding in the school system particularly in those schools still having all Negro populations, with additional schools being needed. Some white schools are under populated. The growth in the school population in recent years is almost entirely Negro, with considerable change in area patterns from the standpoint of changing from white to Negro residents.

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[3] The dearth of evidence probably results from the parties each taking the position that the burden of proof was on the other. The burden is plainly on the board to justify the plan and the delay under it. Having done so and having obtained the approval of the court, we think that the burden shifted to appellants to at least make a prima facie showing that changes were in order.

Opinion of Bell, Circuit Judge

The District Court in this case, after hearing all evidence offered, and full arguments, held:

> "There is no disputing that discrimination had existed prior to the Order of this Court of January 20, 1960, and that the Order of that date was designed to eliminate the discrimination over a period of years. Even plaintiffs' counsel upon the original trial disclaimed any purpose of seeking to have 'wholesale integration.' The only question then involved was the plan by which discrimination could be eliminated; a Plan was carefully prepared and adopted and no appeal taken. The Plan is eliminating segregation, but until it has completed its course there will of course still be areas (in the lower grades) where segregation exists. The Court is therefore at a loss to see how anything could be accomplished at this time by 'an order enjoining defendants from continuing to maintain and operate a segregated, biracial school system,' for the Court has already taken care of that in its decree of January 20, 1960. There is no evidence that defendants are 'continuing to designate schools as Negro or white,' nor that they are maintaining 'racially segregated extracurricular school activities.'
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> "The assigning of teachers and other personnel on the basis of race and color is not now passed upon but is deferred (as other courts have done) awaiting further progress made in the desegregation of the students.
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> "Neither does the evidence show that defendants are maintaining a 'dual system of school attendance area lines.' Proximity to the schools in question is a factor considered by the defendant Board. It is not shown

that defendants are acting arbitrarily in connection with the assignment of pupils in relation to their distance from the school. It does appear that area lines (where such exist) are sometimes changed for the sole purpose of relieving overcrowded conditions in the schools.

* * * * *

". . . The Plan heretofore approved by this Court, and now under attack, has been administered fairly and in good faith by defendant Atlanta Board of Education, the local authorities have given utmost cooperation in maintaining law and order, and the number of students being transferred . . . from previously designated colored schools to previously designated white schools is increasing at an accelerated rate each year as the lower grades are reached. This Court feels that the public interests demand that the Plan now in operation be continued according to its terms and not be summarily displaced by the new Plan of Desegregation proposed by plaintiffs." *Calhoun* v. *Latimer*, N. D. Ga., 1962, —— F. Supp. ——, 7 Race Rel. L. Rep. 1054.

III.

The questions presented may be reduced to four in number. First, can the Atlanta plan be justified in the light of the results of its operation to date, and in view of the teachings of *Brown, supra*, the second *Brown* case, 1955, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, *Cooper, infra*, and the most recent decisions of this court, handed down long after the Atlanta plan became effective. *Bush* v. *Orleans Parish School Board*, 5 Cir., 1962, 308 F. 2d 491; and *Augustus* v. *The Board of Public Instruction of Escambia County, Florida*, 5 Cir., 1962, 306 F. 2d 862. Second, assum-

ing that it may, has it been applied in a discriminatory manner? This includes the questions of admission, assignment, transfers, both formal and informal, and extra-curricular activities. Third, was it error for the District Court to postpone consideration of the practice relating to the assignment of teachers? Fourth, did the court err in not speeding up the plan as suggested by appellants?

And with these facts before us, we begin the consideration of the questions presented with the mandate of the Supreme Court in the second *Brown* opinion in mind. There the court, with regard to eliminating racial discrimination in public education following its decision in the first *Brown* case, *supra*, said:

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. . . .
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> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis.

To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

"While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effecutate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases."

And see *Cooper* v. *Aaron*, 1958, 358 U. S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5, where, after reiterating what was said in the *Brown* implementation decision, and the investiture of supervisory powers in the District Courts for the necessary transition from segregated to desegregated school systems, the court said:

> "Under such circumstances, the District Courts were directed to require 'a prompt and reasonable start toward full compliance,' and to take such action as was necessary to bring about the end of racial segregation in the public schools 'with all deliberate speed.' . . . Of course, in many locations, obedience to the duty of desegregation would require the immediate general admission of Negro children, otherwise qualified as students for their appropriate classes, at particular schools. On the other hand, a District Court, after analysis of the relevant factors (which, of course, excludes hostility to racial desegregation), might conclude that justification existed for not requiring the present nonsegregated admission of all qualified Negro children. In such circumstances, however, the courts should scrutinize the program of the school authorities to make sure that they had developed arrangements pointed toward the earliest practicable completion of desegregation, and had taken appropriate steps to put their program into effective operation. . . ."

Nothing then could stay the inexorable hand of the Constitution in this regard. Some school boards complied without the intervention of the courts. Others acted under court order, as did the Atlanta board. The cases arising are myriad, but each, with respect to transition, goes back to the fountainhead, *Brown* and *Cooper*. Does the plan as

conceiv d and administered comport with the constitutional mandate and the duty imposed on s ool boards and District Courts? Gradualism in desegregation, if not the usual, is at least an accepted mode with the emphasis on getting the job of transition done.

IV.

The questions here may be the better discerned in the background of what appellants offered by way of a plan in the District Court. The plan proposed by them in connection with the motion for further relief which is the subject matter of this appeal suggested a speed up of five years in the original twelve year plan for transition. Their suggestion was that grades eight and nine rather than nine be desegregated in September 1963. They would desegregate grades four, five, six and seven in September 1964, and grades one, two and three in September 1965. They would reassign all high school teachers, counselors, principals and supervisors prior to the opening of school in September 1963 on the basis of qualification and need without regard to race or color. The same procedure would be followed as to such personnel on the succeeding years in connection with the proposed desegregation procedure. All school sponsored, school related, school supported, school sanctioned extra-curricular school activities would be open to all qualified students without regard to race or color as each grade is desegregated. Desegregation would be provided on the basis of drawing school zone lines for each school and assigning all children living in the zone to the school without regard to race or color. It is this last suggestion that is the bare bones of this case and which gives rise to the first question.

Opinion of Bell, Circuit Judge

Appellants do not object to a gradual plan. They do seek to speed it up from a twelve to a seven year span for accomplishment. What they object to is that feature of the court approved plan that permits the continued assignment of those children already in school to the same schools with the right to transfer. This question has not heretofore been before this court. We held in *Bush* v. *Orleans Parish School Board, supra,* and in *Augustus* v. *The Board of Public Instruction of Escambia County, Florida, supra,* that dual school districts must be abolished as they related to the grades being desegregated. We have never laid out a method of abolishment, or adopted a policy of absolutism. The Atlanta plan of abolishment is one of gradualism by permitting transfers from present assignments. The New Orleans plan in *Bush*, formulated by the District Court instead of the school board, begins with the first grade. It recognizes the dual system and provides for its elimination by permitting the children, at their option, to attend either the formerly all white or all Negro school nearest their homes, with transfers to be allowed provided they are not based on consideration of race. The Houston plan which was also court formulated, *Ross* v. *Dyer*, 5 Cir., 1962, 312 F. 2d 191, is substantially like that of New Orleans. We do not yet know what method of eliminating the dual system is to be used in the *Escambia County* case. Even if it may be said that there is a dual system in Atlanta, and the evidence does not so disclose,[4] it can also be said that there is an option under the Atlanta plan just as there is under the New Orleans and Houston plans, assuming the plan is applied to transfers as well as assignments of all new students in

[4] The dual system undoubtedly continues in the grades not yet reached by the plan. It exists in residual form in the grades reached because desegregation has not reached the elementary school grades which feed the high schools.

desegregated grades, and is not based on consideration of race.

This court disapproved one feature, in the nature of an option, of a plan for desegregating the Dallas school system which afforded a modicum of freedom of choice by permitting transfers on the basis of race. *Boson* v. *Rippy*, 5 Cir., 1960, 285 F. 2d 43. The Supreme Court has now affirmed this position in holding invalid similar features in plans of the Nashville and Knoxville school systems. *Goss* v. *Board of Education, City of Knoxville, Tenn.*, —— U. S. ——, 31 L. W. 4559, No. 217, Oct. term, 1962. But, as this court was at pains to say in *Boson* v. *Rippy*, a school board has ample authority to transfer pupils from school to school upon any reasonable and legitimate basis without regard to race or color. The New Orleans and Houston plans contain provisions in point. The Charlottesville, Virginia plan also demonstrates this teaching. Once assignments have been made there on the basis of residence, transfers are permitted upon request of parents or students, and school officials are to take into account residence, academic qualifications, personal desires, need for particular courses, school enrollment, available teaching personnel and physical facilities, and "other lawful and objective considerations", but the court made it clear upon review of the plan that race cannot be a consideration. *Dodson* v. *School Board of the City of Charlottesville*, 4 Cir., 1961, 289 F. 2d 439.

The *Bush* and *Escambia County* cases forbid dual school districts. They authorize the option system. *Boson* v. *Rippy* permits transfers out of single or integrated districts if not based on race. The Atlanta plan when considered in its over-all scope falls within the ambit of these bench marks, if properly and fairly administered. We understand its scope, and it must be so applied, to include

application to the assignment of any student new to a school for admission in a desegregated grade. It is to be applied to all transfers, be they formal, informal or otherwise.

The main thrust or force of its application will be in the admission and assignment from elementary to high schools, and to the first grade. This means that for the school term beginning in September 1964, the plan will lay hold of the feeder system for the first time. This follows from the fact that such factors as are used for assignment and transfer must be used system wide in the assignment and transfer of seventh grade students to the eighth grade since they will be moving from one school to another, elementary to high school. This will remove even the residuum of the dual system from this grade, and will rapidly dissipate it from the other high school grades as other succeeding elementary grades reach the eighth grade. The dual system will be entirely eliminated when the plan reaches the first grade.

The unique Atlanta plan of desegregation from the top down operates in fits and starts when compared with what has become the almost universal plan of starting in the first grade and working up. Nevertheless, it is the one approved and used to date, and it appears that the end mandatory result of a desegregated system will be accomplished under it. And while the progress to date is not looked on with favor by appellants, it may be noted that other results are being attained that are not present in those systems following plans beginning with the first grade. These have to do with the desegregated extracurricular activities that exist in high schools, but not in elementary schools, such as honor societies, athletics, clubs, graduation activities and the like. The importance of these results cannot be gainsaid.

Opinion of Bell, Circuit Judge

The decision reached in this case is in the light of the fact that there is no evidence that the Atlanta School Board has acted other than in the utmost good faith throughout this litigation. There is no evidence that the District Judge has proceeded except in the highest tradition of the federal courts, and in a persistent and wise manner to accord appellants their constitutional rights while at the same time preserving the educational process in the transition period.

Our decision must also be rendered upon a consideration of the most recent pronouncements of the Supreme Court, *Goss* v. *Board of Education, City of Knoxville, Tenn., supra*, and *Watson* v. *City of Memphis*, —— U. S. ——, 31 L. W. 4498, No. 424, October term, 1962, which makes it plain that the time available for the transition from segregated to desegregated school systems is, with the passage of years since the *Brown* decisions, becoming more sharply limited. Indeed, we so stated in an opinion theretofore rendered on May 24, 1963. *Davis* v. *Board of School Commissioners of Mobile County*, —— F. 2d ——. But, on the same day, where a District Court had refused a temporary injunction in a school case, the same panel ordered an immediate start on a one grade per year basis. *Stell* v. *Savannah-Chatham County Board of Education*, —— F. 2d —— (opinion by C.J. Tuttle, concurring, J.J. Rives and Bell). This is said to point up that each case stands to a large extent on its own. There is no circuit-wide formula or minimum by which to measure steps forward or backward, and no decision has so suggested. Good faith and substantial progress are the indispensable ingredients.

So considered, we hold that there is insufficient evidence on which to base a determination that the start made in the Atlanta schools is not reasonable, or that the plan is not proceeding toward the goal at deliberate speed. The court

did not err in denying the speed up. It was a discretionary matter, and there is no showing of an abuse of discretion, in law or in fact.

Nor did the court err in failing to substitute the absolute zone plan as suggested for the present plan to accomplish acceleration. There was no evidence before the District Court from which an approximation might be made of the amount of desegregation reasonably to be expected under such a zone plan, or under an option plan with a transfer provision such as is being used in New Orleans and Houston, or under a zone plan with a transfer provision such as is being used in Charlottesville. In short, there was nothing to show the inadequacy of the present system in comparison.

It is clear that no student has complained to the court concerning discriminatory treatment by those in charge of the schools, either in being afforded transfer rights, or in the administration or application of those rights. Counsel for the school board recognized in argument the possible discriminatory application of the plan with respect to differences in requirements for formal and informal transfers. No ruling was made in the court below on this or the fact that the plan is not being used for the initial assignment of students new to a school and to grades that have been desegregated. They were there considered, if at all, as incidental to the main question of continuing present assignments. They were never called to the attention of the school board.

V.

We affirm the order of the District Court within the context of what we have had to say regarding the plan, and having in mind that the jurisdiction of the District Court

will continue. Such deficiencies as we have pointed to, or other matters involving discrimination which may arise may be considered by the District Court in the event they are not adjusted by those having charge of the schools. See *Ross* v. *Dyer, supra,* where the brother-sister rule was voided. This is in line with the procedure followed in *Dodson* v. *School Board of the City of Charlottesville, supra,* where a plan already in operation was recently examined by the Court of Appeals for the Fourth Circuit and found deficient in some respects. The decision was affirmed with a proper caveat to the deficiencies. It was there said:

> "The action we take is based on the particular history and circumstances associated with this case. In appeals involving school desegregation problems, where the Supreme Court has permitted a period of transition for the desegregation of schools, each case is to some extent dependent on its own particular facts. The attitude of particular school authorities, their past conduct, the progress they have been making, the varying administrative difficulties that may be shown to exist in different localities, the court's view as to the officials' future intentions, and other factors must be taken into consideration."

The plan of the District Court here is for the transition period. Time will tell whether other questions regarding discrimination in the areas of extra-curricular activities, or leading from the assignment of teacher personnel are rendered moot. There is no evidence to support the charge of discrimination in extra-curricular activities in the grades that have been desegregated in Atlanta, and the District Court did not err in postponing the consideration

of teacher assignment question. *Augustus* v. *Board of Public Instruction of Escambia County, Florida, supra.*

In the meantime the Atlanta plan is working. Progress is the test, and the necessary transition is taking place. There has been no trouble. All responsible officials and many private citizens have cooperated to make it work, and to preserve public education.

We do wish, however, to point out some fundamentals to be borne in mind in the future handling of this and like matters where an approved plan is in operation. Whether to effect a plan, to speed it up, or to otherwise modify it is in the first instance for the school board. This is likewise true as to problems arising in connection with the administration of a plan. The courts are ill equipped to run the schools. Litigants must not ignore school officials, and school officials must not abdicate their function to the courts. They, like the courts, are bound by the Constitution as interpreted by the Supreme Court. *Cooper* v. *Aaron, supra.* With these principles in mind, this record discloses no problem that could not be resolved between appellants and the school officials based on the judgment of the school officials as educators, with the application of wisdom, forebearance and mutual trust to the educational purpose of schools.

The judgment appealed from is

AFFIRMED.

Dissenting Opinion of Rives, Circuit Judge

RIVES, Circuit Judge, Dissenting:

With deference I respectfully dissent. Before expressing reasons, it seems appropriate to state my agreement that all of the parties to this litigation and the district court as well are entitled to the complimentary remarks made of them in the majority opinion. I think, too, that the appellants now before the Court should not be faulted in seeking additional relief because of their willingness, for a period of two years, to permit the Atlanta plan to be tested out without appealing to this Court for any faster relief.

It is apparent from the record that the district court, working patiently with the plaintiffs and with the Atlanta School Board, sought to devise a method by which the first breach in the race barriers might be made. However, it is no criticism of the good faith of the parties involved for me to point out now, as did the Supreme Court in its opinion in *I. A. Watson, et al.* v. *City of Memphis, et al.*, —— U. S. ——, No. 424, October Term, 1962, that:

> "It is now more than nine years since this Court held in the first *Brown* decision, *Brown* v. *Board of Education*, 347 U. S. 483, that racial segregation in state public schools violates the Equal Protection Clause of the Fourteenth Amendment."

Largely on the basis of what the Court there said, and also because this Court has expressly required other Boards of Education in litigation in this Circuit, see *Augustus* v. *Board of Public Instruction*, 5 Cir., 306 F. 2d 862, and *Bush* v. *Orleans Parish School Board*, 5 Cir., 308 F. 2d 491, to take steps towards desegregation of the schools that go considerably further than was required by the district

court in this case, I cannot agree that we should affirm this judgment. For us to do so amounts to a backward step rather than a step consistent with what I consider to be the clear teaching of the Supreme Court's unanimous opinion written by Mr. Justice Goldberg in the *Watson* case:

> "Given the extended time which has elapsed, it is far from clear that the mandate of the second Brown decision requiring that desegregation proceed with 'all deliberate speed' would today be fully satisfied by types of plans or programs for desegregation of public educational facilities which eight years ago might have been deemed sufficient. Brown never contemplated that the concept of deliberate speed would countenance indefinite delay in elimination of racial barriers in schools. . . ."

The essential fact, as disclosed by the record before us, is that the schools of the City of Atlanta do not have a single grade, in either the grammar or high schools, in which Negro children are permitted to become students on the same basis as are white children. In other words, whatever may have produced this result, it is not disputed that it is impossible for a Negro student in the top three grades, which have, under the Atlanta plan, been "desegregated," to enter such desegregated school without being subjected to requirements that *do not apply* to any white student in the grade. This comes about by reason of the fact that, while the basis for first considering applications of a Negro student for a transfer to a white school is the test normally conducted during the school year for all students, both white and Negro alike, the Negro student seeking to transfer is required to meet *standards* based upon an analysis of his tests and also based upon a "personality interview,"

which do not apply to the white students who are already enrolled in the school, or who come into the grade from a lower grade by reason of having been in a "feeder" system as to which all white children are in white schools and all Negro students are in Negro Schools.[1]

As is pointed out by the majority opinion:

> "The standard used was that the transferee (the Negro student) had to score a grade at least equal to the average of the class in the school to which transfer was requested."

And, as also pointed out in the majority opinion:

> "Each student [transferee] was also given a personality interview by school officials to determine probable success or failure in the new school."

On the face of it, of course, this means that if a Negro student seeks a transfer from Booker T. Washington High School (Negro) into the twelfth or eleventh grade at Northside High School, a white school, the Negro student has to demonstrate from his record at Booker T. Washington that his grade was "at least equal to the average of the class" in Northside, whereas *every* passing student entering that grade from the lower grade in Northside High School would automatically be admitted in such grade. Of course, it would be ridiculous to suggest that before students passing from eleventh grade Northside to twelfth grade Northside could be admitted to the twelfth grade their prior

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[1] I use the term "white and Negro schools" in a practical sense. Considerable attention is paid by the trial court and the majority to the fact that the words "Negro" and "White" no longer appear in the literature of the Board of Education. That there are still Negro and white schools, however, is conceded by the appellees. See footnotes 3 and 4, *infra*.

record must have equaled the average of the class in the eleventh grade. It takes no professional testimony to indicate the absurdity of such a requirement. Yet this is precisely the requirement which is imposed on every Negro transfer student. Moreover, so long as an eleventh grade student attains the passing standard required by the school at Northside, he passes into the twelfth grade without being subjected to a "personality interview" by school officials to determine probable success or failure in the twelfth grade.

Even though the appellants did not appeal from the original decision of the trial court approving the transfer plan in the Atlanta Schools, this did not foreclose the right of appellants to complain that, when the plan was actually put into operation, it was operated in a manner that clearly discriminated against the Negro students. Nor is this a criticism of the good faith of the School Board, which may have considered that it had adequate reasons for wishing to impose these higher standards on the first Negro students who were to be admitted into the white schools. This, however, was not within the contemplation of the district court's original order, which expressly provided that the plan was not to be based on consideration of race. It seems to me that the majority opinion justifies the continued approval of the present plan *on the assumption* that it is "not based on consideration of race," because the opinion states:

> ". . . it can also be said that there is an option under the Atlanta plan just as there is under the New Orleans and Houston plans, *assuming* the plan is applied to transfers as well as assignments of all new students [which, of course, it is not] in desegregated grades, and is not based on consideration of race [which it plainly is]." (Emphasis added.)

Dissenting Opinion of Rives, Circuit Judge

Since the assumption on which the opinion rests is demonstrably not correct, the opinion cannot be logically supported.

The Court of Appeals for the Fourth Circuit, in *Green* v. *Board of Education of City of Roanoke*, 4 Cir., 1962, 304 F. 2d 118, 123, has expressly met and answered this point; that is, whether the requirement of a higher *standard* of performance of Negro students, based on tests uniformly taken by all students, meets even the initial requirement for desegregating a single grade:

> "The requirement that a Negro seeking transfer must be well above the median of the white class he seeks to enter is plainly discriminatory. The board's explanation that this special requirement is imposed on Negroes to assure against any 'who would be failures' is no answer. The record discloses that no similar solicitude is bestowed upon white pupils. . . .
>
> "The federal courts have uniformly held that such unequal application of transfer criteria[2] is a violation of the Negro pupils' rights under the Fourteenth Amendment."

Green v. *Board of Education of City of Roanoke*, 304 F. 2d 118, 123, citing *Jones* v. *School Board of City of Alexandria*, 4 Cir., 1960, 278 F. 2d 72, 77; *Dodson* v. *School Board of City of Charlottesville, Va.*, 4 Cir., 1961, 289 F. 2d 439, 443; and this Court's opinion in *Mannings* v. *Board of Public Instruction*, 5 Cir., 1960, 277 F. 2d 370, 374-375.

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[2] Throughout the discussion in the trial court and throughout the opinion of the majority, emphasis is placed on the fact that the same tests are given to white and Negro children, and that they are all subject to the same grading system. The significant point is not the tests, but the *use that is made of them*. Thus, it is a question of the application of criteria to the Negro student's grades that are not applied to the grades of the white student.

The opinion in the *Green* case also answers the contention made by appellees and accepted by the majority that an attack on the discriminatory manner of handling the plan must be by each individual student. See 304 F. 2d 118, 124. The discriminatory application of the plan can be challenged for the class as can the unconstitutionality of segregated schools.

Counsel for the School Board make the point, which seems somewhat persuasive to the majority, that in all "regular transfers" [3] the transferring student was subjected to the same requirement that he meet the standard equal to the average of the school to which transfer was sought, and that he be subject to a personality interview. This, of course, does not meet the problem at all, because every white student would remain in a white school without having himself subjected to these testing or interview criteria by reason of that fact that every student in the Atlanta schools below the "desegregated" grades goes to school under a dual system,[4] where white children go to white

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[3] The record shows that the only Negro applications for transfer to white schools that were considered were those submitted between May 1 and May 15 of each year. In addition to these there were many transfers made "informally" during the school year by white students among white schools, or by Negro students among Negro schools. The criteria above discussed were not applied to these informal transfers.

[4] While the trial court stated, "neither does the evidence show that defendants are maintaining a 'dual system of school attendance area lines,'" and the majority opinion says, "even if it may be said that there is a dual system in Atlanta, *and the evidence does not so disclose*" (emphasis added), both statements are incorrect. The Superintendent of Schools, who was the only witness, testified as follows on page 90 of the Record:

"Q. And by whom are these administrative lines drawn?

"A. By the area superintendent in cooperation with the school officials, local school officials.

schools and Negro children go to Negro schools.[5] There was only one instance of a formal application of a white girl seeking a transfer from one white school, which was about

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"Q. And these lines serve to delineate the area for particular elementary schools?

"A. Yes, to the degree that it is necessary to balance one school's attendance.

"Q. Now, in the areas where the housing is mixed racially, that is, the areas where Negroes and whites live in the same area, these lines would overlap, so to speak, wouldn't they?

"A. Well, formerly they were drawn separately for white and Negro schools.

"Q. And how are they drawn now?

"A. They are drawn on the basis of the Pupil Placement Law under which we are operating. There has been no change in the elementary situation.

"Q. Now, you say the lines are drawn now pursuant to the Pupil Placement Laws. Is that a state law or is that the plan?

"A. That is the plan.

"Q. And you say the lines are drawn pursuant to that?

"A. The same lines that were in existence in 1960 are in existence at the present time.

"Q. I see.

"A. With variations that have been made. There have been no specific change in those lines.

"Q. And you still have separate lines which relate to the Negro schools and separate lines which would relate to the white elementary schools; is that right?

"A. Roughly, yes."

[5] The Superintendent testified at page 92 of the Record:

"Q. You have sort of a feeder system where certain elementary schools would feed into certain high schools?

"A. Yes.

"Q. And, of course, the Negro elementary schools would feed into one of these six Negro high schools?

"A. Yes.

"Q. And the white elementary schools would feed into one of these eighteen white or formerly white high schools?

"A. Right.

"Q. Is that the way these high school students are now assigned to the schools?

"A. The same way, except they are subject to transfer upon request."

to be desegregated, to another white school, which thus far had not admitted any Negro students. This, the Board, the district court and this Court held to be an application made clearly outside the purview of the transfer plan, since it stated on the face of the application that the girl sought to transfer from a school which was about to be desegregated, *by reason of the fact of such desegregation.* Thus it is that no good faith application for transfer within the regular period has been made by any white student and none need be made in light of the freedom of transfer by the informal method and by reason of the fact that the "feeder" system from white lower grades automatically guarantees the passage of each student to a white upper grade.

Moreover, entirely beyond the question of whether the present Atlanta plan truly desegregates any grade of school, which I think the record belies, there is the matter of timing which has heretofore come to this Court's attention in the Escambia County case and the Orleans Parish case already mentioned. In the case of Escambia County, the principal city of which is Pensacola, Florida, the Board had proposed a plan at the Court's direction, which the trial court had approved, providing for applications for transfers in all grades of school, such transfers to be applied to Negro and white students alike upon tests uniformly applied. We concluded that until a start was made in abolishing a dual system of schools, whereby all white children went initially to white schools and all Negro students went initially to Negro schools, no plan of selective transfer from formerly Negro to formerly white schools would satisfy the requirements of deliberate speed under the *Brown* decision. In 306 F. 2d 862, at page 869, this Court said less than a year ago:

> "There cannot be full compliance with the Supreme Court's requirements to desegregate until all dual school districts based on race are eliminated. It is probably too late, without undue confusion, to require the elimination as to any grade of such dual district in time for the 1962 fall term. The plan should, however, provide for the elimination of all dual districts on racial lines at the earliest practicable time. If it appears too late for such elimination as to any grade in time for the 1962 fall term, then the plan should provide for such elimination as to the first two grades for the *1963 fall term*, and thereafter for such elimination as to at least one successive additional grade each school year."

Augustus v. *Board of Public Instruction*, 5 Cir., 1962, 306 F. 2d 862, 869.

In *Bush* v. *Orleans Parish School Board*, upon its last appearance here, 308 F. 2d 491, the *district court* had already required the Board of Education of Orleans Parish to modify its plan of permitting transfers under the State Pupil Assignment Law, which by that time had applied to two grades of school, by requiring the complete desegregation of the first grade of school beginning September 1962. The order required the abolition of the dual system of schools as to that grade. In an opinion that carefully considered the constitutional and administrative problems involved, *this Court added further requirements* to the effect that in September, 1964, the dual system shall be abolished for the first five grades, and that each year thereafter, as each succeeding higher grade is desegregated, the dual system shall be abolished contemporaneously therewith.

Dissenting Opinion of Rives, Circuit Judge

It is clear to me, as it must be to any who read and understand these two decisions by this Court, that if we accept the decision represented by the majority opinion in this case, the Court will have stepped backward from the position it has previously taken after long and mature deliberation, and that this Court will have deliberately required a prompter compliance with the Supreme Court's decision in New Orleans and Pensacola than is being required in Atlanta, a community in which all the evidence and the opinions of the district court and of the majority clearly indicate accommodation to the requirements of the Constitution can be expected to be made with a minimum of difficulty.

Enjoined as we are to give fresh consideration to the element of timing in these school cases by the Supreme Court's latest pronouncement on the subject in the *Watson* case, *supra*, and, following the *Watson* decision, in *Josephine Goss, et al.* v. *Board of Education, City of Knoxville, Tenn., et al.*, —— U. S. ——, 31 L. W. 4559, No. 217, Oct. Term, 1962,[6] I cannot concur in a decision of this Court that takes a backward rather than a current, much less forward, step.

I would require the moderate rate of increase prayed for by appellants to the extent of desegregating the classes to include the eighth and ninth grades in 1963, and the fifth, sixth and seventh grades in 1964. This is roughly parallel to what we required in *Bush*.

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[6] In construing language of a transfer plan for the schools of Knoxville, Tennessee, and of Davidson County, Tennessee, the Court said:

"Now, however, eight years after this decree was rendered and over nine years after the first Brown decision, the context in which we must interpret and apply this language to plans for desegregation has been significantly altered. Cf. Watson v. City of Memphis, supra."

Judgment

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1962

No. 20,273

D. C. Docket No. 6298 Civil

VIVIAN CALHOUN, *et al.*, Infants, by FRED CALHOUN, their father and next friend, *et al.*,

Appellants,

—versus—

A. C. LATIMER, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

Before RIVES, LEWIS* and BELL, *Circuit Judges.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Vivian Calhoun, and others, Infants, by Fred Calhoun

* Of the Tenth Circuit, sitting by designation.

their father and next friend, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Rives, Circuit Judge, Dissents"

June 17, 1963

Issued as Mandate: SEP 26 1963

Opinion on Petition for Rehearing

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20,273

VIVIAN CALHOUN, *et al.*, Infants, by FRED CALHOUN, their father and next friend, *et al.*,

Appellants,

—versus—

A. C. LATIMER, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

(August 16, 1963.)

Before RIVES, LEWIS,* and BELL, *Circuit Judges.*

PER CURIAM: It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause be, and the same is hereby DENIED.

The record before the court in this case did not relate to any practices having to do with transfers and assignments for the 1963-64 school term. We referred to certain deficiencies found in the Atlanta plan on that record, and affirmed on the premise that such deficiencies would be adjusted by those having charge of the schools, or upon their failure, by the District Court.

* Of the Tenth Circuit, sitting by designation.

Opinion on Petition for Rehearing

The corrective action necessary in light of the deficiencies will entail the application of the plan in an even handed manner without regard to race to all assignments of pupils new to a school for admission in a desegregated grade in that school; and to all transfers whether formal, informal or otherwise. Personality interviews to determine probable success or failure in the schools to which transfer and assignment is sought may not be utilized where such a practice relates only to Negro pupils as was the case. No standard requiring that a transferee score a grade on scholastic ability and achievement tests equal to the average of the class in the school to which transfer is sought may be utilized, nor may any scholastic requirement whatever be used where applied only to Negro students seeking transfer and assignment as was the case in Atlanta in the administration of the plan approved by the District Court. The opinion is modified to make it clear that this corrective action must apply to transfers and assignments for the 1963-64 school term to the extent, if any, that the practices giving rise to the deficiencies may have been continued in use.

RIVES, Circuit Judge, I dissent.

Order Denying Rehearing

Extract from the Minutes of August 16, 1963

No. 20,273

VIVIAN CALHOUN, *et al.*, Infants, by FRED CALHOUN, their father and next friend, *et al.*,

—versus—

A. C. LATIMER, *et al.*

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby denied.

"Rives, Circuit Judge, Dissents"

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IN THE

Supreme Court of the United States

Case No. 623

VIVIAN CALHOUN, et al.,

Petitioners,

vs.

A. C. LATIMER, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

Case No......

VIVIAN CALHOUN, et al.,

Petitioners,

vs.

A. C. LATIMER, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

QUESTION PRESENTED

The United States District Court for the Northern District of Georgia, Atlanta Division, held that the respondents were proceeding in good faith to effect desegregation of the public school system of Atlanta, as required by the United States Constitution, and in conformity with the mandate of the second *Brown* case. The United States Court of Appeals for the Fifth Circuit affirmed "within the context of what we have had to say regarding the plan." Is there need for this Court to review or displace the discretion of those courts, or to dis-

turb the orderly transition to desegregated education in Atlanta?

STATEMENT

This suit commenced on January 11, 1958. An injunction was issued by the District Court forbidding the defendant school board to continue their former policy of enforcing segregation in the public schools under their control. By way of implementing its decree, the Court also ordered the defendants to submit a desegregation plan for the school system of the City of Atlanta, and this was done on November 30, 1959.

The plan submitted was a pupil placement plan modelled after the plan approved by this Court in *Shuttlesworth* v. *Birmingham Board of Education*, 358 U.S. 101, 3 L. Ed. 2d 145, 79 S. Ct. 221 (1958). Its main features were as follows: (1) The plan provided for desegregation of one grade a year. (2) It contemplated initial reassignment of all pupils to the schools they were then attending, with transfers or other future assignments to be governed by the eighteen criteria set out in the plan. (3) It made no provision respecting the hiring or assignment of faculty or supervisory personnel or staff.

A number of objections were made to the plan, or rather to various provisions of it, including to its main features (1) and (2) above. (R. 29; 377; 391). A hearing was held on the objections to the plan. One of the eighteen criteria was ordered excised from the plan, based upon *Cooper* v. *Aaron*, 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 19 (1958). Some of the criteria were susceptible of more than one interpretation and application, and the Court's order specified that such criteria could not be applied in a racially discriminatory way.

The District Court required a modification of the plan so as to show that all administrative remedies under the plan could be exhausted by not later than September 1 of any year, thus meeting an objection of the Plaintiffs that the administrative provisions of the plan could be used for delay.

Some of the objections of the Plaintiffs were denied. The objection that the plan reassigned all school children to the schools which they were attending at the time was denied. In the hearing on the objections to the plan, on December 14, 1959, there occurred the following colloquy between the Court and counsel for the Plaintiffs:

> "THE COURT: Let me ask you this: The plan as submitted by the Atlanta School Board says in effect that all the pupils I assume are in the classes and in the schools that they are now in but it makes provision for the application of any person to go from one to another. You seem to think that is not a plan and when you say complete integration or complete abolition of segregation, just what do you mean? Do you mean taking all of the schools and eliminating every student from every school in which they are now in? Specifically how would you recommend going about it?
>
> "MRS. MOTLEY: Well, I don't mean moving every student in every school; what I refer to in addition to assignment of pupils is the designation of certain schools as Negro and white." (R. 31 et seq.)

The order of the Court dated December 30, 1959 stated:

> "Essentially the plan contemplates that all pupils in the school shall until and unless transferred to some other school, remain where they are . . . ." (R. 29).

The plan was ordered put into effect on May 1, 1960, contingent upon the enactment by the General Assembly of Georgia of legislation permitting it. The reason for this was recognition by Judge Hooper that under Georgia laws on the books at the time any integration in the Atlanta school system would result in termination of State financial support to such system. This in turn would have resulted in the closing of all Atlanta public schools, which latter effect might cause the closing of all Georgia schools under the doctrine of the Fourth Circuit case of *James* v. *Almond*, 170 F. Supp. 331 (E.D. Va., 1959).

The Georgia General Assembly convened and adjourned without enacting the legislation upon which the plan had been made contingent. On February 26, 1960, the plaintiffs made a motion for further relief asking that the plan be ordered into effect anyway. That is to say, the plaintiffs, though presumably not wholly satisfied with the plan since many of their objectives had been overruled, nevertheless accepted the plan at that time and asked that it be put into effect. On March 9, 1960, the motion for further relief was denied.

An appeal was taken at that time. However, the plaintiffs decided to await the report of the Sibley Commission (a committee of prominent Georgians appointed by the Legislature to hold hearings throughout the State and take the sentiment of the people of Georgia as to whether they would prefer integrated schools or no schools at

all). Accordingly, the plaintiffs moved to dismiss their appeal. Plaintiffs were required by the District Court to amend their motion to dismiss the appeal and specify the order being appealed and the effect of the dismissal. (R. 32)

The amended motion to dismiss the appeal made it clear that appeal had been taken from the refusal to put the plan into effect in May 1960 rather than from the rulings of the District Court upon the various objections to the plan. Those rulings were acquiesced in by both sides, by the plaintiffs by their failure to appeal and by their motion to have the plan put into effect, and by the defendants by their failure to appeal and their amendments to the plan in compliance with the order of December 30, 1959.

The plan went into effect on May 1, 1961, after enabling legislation by the General Assembly of Georgia.

On April 30, 1962, the plaintiffs moved for further relief. Hearings were held on this motion on July 31, 1962, and again on October 30, 1962. The plaintiffs' motion was denied on November 15, 1962. In his order, the District Judge made clear his finding that the plan was being carried out in good faith according to its terms. He also indicated that he considered that, in most respects, the motion for further relief merely raised again questions concerning the validity of the plan as a whole. He thought that the plan could not be said, at that time, to have been given an adequate trial, since it had been in effect only two years at the time. Its final impact could not be assessed as yet. (R. 348, et seq.; R. 293).

Plaintiffs appealed to the Fifth Circuit, which affirmed. In the course of doing so, the Court made a number of

remarks about the plan which have had, and will have, significant effects upon the operation of the plan. We will make further references to this *infra*.

The Court will perhaps judicially notice that public figures active in Georgia politics took positions in defiance of the Supreme Court after the school segregation cases. This has never been true of the leadership of the City of Atlanta, nor of the respondents in this case. The Courts below have found that these respondents conscientiously and in good faith attempted to proceed with desegregation.

At the time when the District Court first had this case, and then when it was on the point of ordering desegregation of the Atlanta school system, there was very real fear in the City that public education would be lost. Citizen groups formed to save the schools, and they were successful. Since that time the prevailing attitude in the State has shifted greatly. Most, if not all, of the obstacles placed in the way of this Board of Education have now at last been swept away.

Still, the desegregation plan here contested has been in operation only since the fall of 1961. That is not the fault of the respondents. The District Court in the exercise of a wise restraint withheld his injunctive order until such time as the plan could be put into effect without destroying public education in Georgia. We believe the progress we have to report, and the actions of the respondents and the Court below, should be considered against that background.

The pupil placement plan went into effect for the school year that began in September, 1961, and it applied to the twelfth and eleventh grades (Atlanta having

adopted a top-down system similar to that of Little Rock, Arkansas, but unlike most cities). Under the plan, as we have seen, children were automatically assigned to the schools in which they already were, and they were free to apply for transfers. That year ten Negro children were assigned to formerly white schools. It was a small beginning, but it seemed momentous at the time. One white child who sought a transfer because Negroes were admitted to her school had her request denied because it was placed upon racial grounds and therefore did not meet the standards of the plan. See *Stone* v. *Members of the Board of Education City of Atlanta*, 309 F. 2d 638 (C.A. 5th, 1962), and cf. *Goss* v. *Board of Education of the City of Knoxville*, 373 U.S. 683, 10 L. Ed. 2d 632, 83 S. Ct. 1405 (1963).

In the second year of operation the plan was applicable to grades ten, eleven and twelve and 44 additional Negroes transferred to formerly all white schools. The figure for the current year is 144. For the year commencing September, 1964 we anticipate a much more substantial increase, for reasons that will appear *infra*.

In the Atlanta school system there are twenty-two high schools (not counting Faith School which has only the eighth grade, which is counted as high school under the Atlanta system of seven years grammar school, five years high school). Of these there is some measure of desegregation in ten. The partially desegregated schools have a total enrollment of 11,790 students, as against a total high school enrollment of 33,197.

The integration which has occurred has been total, in the sense that such extracurricular activities as honor societies, athletics, clubs, graduation activities, P.T.A.'s,

and the like, have been conducted on a non-racial basis in the desegregated schools. (See the opinion of Judge Bell in the Court below at P. 22a, Appendix to petition for certiorari.)

The desegregation plan originally included some eighteen criteria to be employed to determine whether requests for transfer should be granted. In spite of the fact that two courts have found that the plan was being fairly administered with the good faith purpose of achieving complete desegregation at the earliest practicable time, the respondents have gradually shrunk the requirements of the plan to make transfer under it easier and to remove even the ground for suspicion of abuse of discretion. Almost all of the criteria governing transfers have been dropped, most of them without the compulsion of a court decree. All of the ones that were susceptible of abusive use of discretion have been dropped.

The following criteria, having been determined to serve no useful educational purpose, have been dropped:

a) the effect of the admission of new pupils upon established or proposed academic programs;

b) the suitability of established curricula for particular pupils;

c) the adequacy of the pupil's academic preparation for admission to a particular school and curriculum;

d) the scholastic aptitude and relative intelligence or mental energy or ability of the pupil;

e) psychological qualification of the pupil for the type of teaching and associations involved;

f) the possibility or threat of friction or disorder among pupils or others;

g) the possibility of breaches of the peace or ill will, or economic retaliation within the community;

h) the effect of admission of the pupil upon the academic progress of other students in a particular school or facility thereof;

i) the effect of admission upon prevailing academic standards at a particular school;

j) the psychological effect upon the pupil of attendance at a particular school;

k) the home environment of the pupil;

l) the maintenance or severance of established social and psychological relationships with other pupils and with teachers;

m) the ability to accept or conform to new and different educational environment;

n) the morals, conduct, health and personal standards of the pupil.

The most important changes in the plan, however, are those that have taken place as a result of the opinion of Judge Bell, or are planned for September, 1964. These are not in the record, of course. We are dealing with a record made in the first days of desegregation, yet the Court is asked to assess the degree of progress toward a goal made over a period of time. We do not see how that can fairly be done unless we, as attorneys and spokesmen for the school board, may make reference to things

that have occurred after the making of the formal record. In this connection we would invite the Court's attention to the opinion in *Watson* v. *City of Memphis*, 373 U.S. 526, 10 L. Ed. 2d 529, 83 S. Ct. 1314 (1963), in the course of which reference is made to the fact that several city parks had been desegregated since the filing of the petition for certiorari. (Also, see n. 8 at 83 S. Ct. 1320.)

We believe the construction we place upon the opinion of Judge Bell goes the whole way toward satisfying the complaint that the petitioners appear to regard as their principal grievance, even though we do not think the Fifth Circuit has demanded the marking off of school zones as rings of iron around each school.

Upon the receipt of the opinion of the Court below, upon advice of counsel, the school authorities called in every child who had made a request for transfer during the period provided in the plan. If that child said that he still wanted the transfer granted it was granted, on one condition only, namely, that the school he wished to attend was closer to his home than the school he was then attending. (See, in the Appendix, the letter from a school official to one of the attorneys for the respondents.)

In the preceding paragraph there is a reference to requests for transfer "during the period provided in the plan." It is clear from the opinion of the Circuit Court that such a qualification is no longer permissible, and it has been abandoned.

For the school year beginning September, 1964 the desegregation plan will be effective for grades eight through twelve. As we interpret the opinion of the Court

below, every student in those grades in the City of Atlanta system, irrespective of race, shall be entitled, as a matter of right, to attend the school nearest his home. We think that acceptance of that principle can scarcely be said to be less than good faith implementation of the applicable constitutional principles.

We also think that, consistent with such principles, modifications may be made to take into account natural physical barriers as, for example, an expressway or railroad track between the child's home and the school. We believe that we may retain transfer provisions, without racial criteria, authorizing children to transfer to schools other than the closest ones, where such schools have sufficient capacity to accommodate the transferees and transportation is available. Cf. *Goss* v. *Board of Education of City of Knoxville,* 373 U.S. 683, 83 S. Ct. 1405, 10 L. Ed. 2d 632 (1963).

We would make a proviso for special cases such as that presented by East Atlanta High School and Murphy High School. Because of their proximity to each other and the relative sparseness of the population in the area, East Atlanta High would be under-utilized unless assignments may be made to it against the wishes of students who live closer to Murphy or to other schools.

That is the situation with regard to desegregation in the Atlanta schools at the present time, and the intentions of the school authorities for the school year beginning next September. We would still oppose the drawing of school zones by a Court or even the school authorities. Atlanta has never had a system of zones. Some years ago the City was served by one central high school for boys and one for girls. (We refer only to the

white schools. The system was segregated, of course.) When this scheme was abandoned and the City changed to a modified neighborhood school scheme there still were no zones. Whenever problems of crowding, or under-utilization, occurred, they were solved on an ad hoc basis by the school principals affected, or by the area superintendent. This was not an anti-integration scheme; segregation was not an issue then. That system has worked well and the school authorities consider that, educationally, it best serves Atlanta, and they are anxious to preserve it. Allowing every child to attend the school nearest his home we believe achieves total desegregation.

REASONS RELIED ON FOR ALLOWANCE OF WRIT DISCUSSED

The argument of petitioners under this heading may be conveniently subdivided into three parts. These parts relate respectively to the items we characterized at the beginning of this brief as the three main features of the Atlanta plan for desegregation. We will discuss each of them in turn.

1. The plan is proceeding with all deliberate speed.

This court recognized in *Brown* v. *Board of Education of Topeka*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955), that accomplishment of desegregation would require solution of a large number of problems, and that this could not be done overnight. It was also recognized that courts were but ill equipped to accomplish this task and that primary responsibility for it should rest with the local school boards. The Court declared that the function of the courts would be to super-

vise the school authorities to ensure that they act in good faith to implement governing constitutional provisions. This was a carefully considered view. A year elapsed between the holding that segregated education is unconstitutional and the formulation by this Court of the implementation decree. We believe the reasons for the adoption of that approach are still valid. What the petitioners ask in this case is nothing less than the abandonment of the principles of the second *Brown* case and the adoption of the position that was rejected in that case.

Petitioners emphasize that eight years have passed since that case. Public officials in Georgia did not accept the propriety of *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), when it was first decided and they effectively prevented compliance by the Atlanta Board of Education to the brink of destruction of public education in Georgia. (R. 108) All that is past now. The plan has been in operation for a little over two years. It is an orderly plan calculated to produce the constitutionally required result.

The District Court held:

> "The Plan heretofore approved by this Court, and now under attack, has been administered fairly and in good faith by defendant Atlanta Board of Education, the local authorities have given utmost cooperation in maintaining law and order, and the number of students being transferred each year from previously designated colored schools to previously designated white schools is increasing at an accelerated rate each year as the lower grades are reached. This Court feels that the public interests

> demand that the Plan now in operation be continued according to its terms and not be summarily displaced by the new Plan of Desegration proposed by plaintiffs." (See page 6a, Appendix to pet. for cert.)

Other cities and other states have had a different experience. The very purpose and meaning of the holding in the second *Brown* case was that this would be so, and that all school districts could not move in lock step. For these reasons it is clear that there is no conflict between circuits, or within a circuit, merely from the fact that two school districts are allowed to move at different speeds, or to arrive at the ultimate goal at slightly different times. What is necessary is that the lower federal courts apply correct constitutional principles, and that local school boards act in good faith toward the end of achieving desegregated school systems. Neither of those requirements is missing here.

This Court reaffirmed this basic view in *Cooper* v. *Aaron*, 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 19 (1958), where it was said:

> "Under such circumstances, the District Courts were directed to require 'a prompt and reasonable start toward full compliance,' and to take such action as was necessary to bring about the end of racial segregation in the public schools 'with all deliberate speed.' . . . Of course, in many locations, obedience to the duty of desegregation would require the immediate general admission of Negro children, otherwise qualified as students for their appropriate classes, at particular schools. On the other hand, a District Court, after analysis of the

> relevant factors (which, of course, excludes hostility to racial desegregation); might conclude that justification existed for not requiring the present non-segregated admission of all qualified Negro children. In such circumstances, however, the Courts should scrutinize the program of the school authorities to make sure that they had developed arrangements pointed toward the earliest practicable completion of desegregation, and had taken appropriate steps to put their program into effective operation. . . . " 358 U.S. at p. 7.

Those words were spoken in 1958, four years after the first *Brown* decision. It is clear that they still describe the law. In no case has this Court undertaken to take over the task of the school boards of formulating a desegregation plan, nor that of the lower federal courts of supervision. More particularly, this Court has never attempted to say precisely what speed was "all deliberate speed" for a particular community. If this Court were to decide in this case that a twelve-year plan was too slow for Atlanta, it would have to do so either by abandoning the decision of the second *Brown* case, as reaffirmed in *Cooper* v. *Aaron*, supra, that the precise speed appropriate should be left to local school boards under the supervision of the lower courts, or by deciding that the Fifth Circuit and the District Court have clearly abused their discretion in this case. We respectfully submit that this Court should not be prepared to take either of those steps. If the principles of the second *Brown* case were valid in 1955 and 1958, they are valid today.

In *Watson* v. *City of Memphis*, 373 U.S. 526, 83 S. Ct. 1314, 10 L. Ed. 2d 529 (1963), this Court held that public parks and golf courses in Memphis had to be opened

to persons of all races without delay. In the course of the opinion note was taken of the passage of time since *Brown* v. *Board of Education of Topeka,* supra. This was in the context of a holding that there was no need to apply the principles of the second *Brown* case to such matters as golf courses. The Court said, quite correctly, that all that needed to be done was open them up. To have held otherwise would have been to accept the argument made by the City that delay was necessary because of the threat of riots. This would have been to retreat from *Cooper* v. *Aaron,* supra, and indeed from a government of law. But Atlanta does not ask that, nor for the indefinite delay that the Court said in *Watson* could not be countenanced. We have a school system with well over one hundred thousand pupils in it that must be converted from a dual to a unitary system. We ask only that we be allowed to do this in systematic fashion.

This Court has several times declined to get into the business of deciding, for each city, how fast is fast enough. When *Aaron* v. *Cooper,* 243 F. 2d 361 (C.A. 8th, 1957), was in the Eighth Circuit a major question to be decided related to the speed of desegregation. When the case appeared here as *Cooper* v. *Aaron,* supra, that feature of the case was left undisturbed.

Kelley v. *Board of Education of City of Nashville,* 270 F. 2d 209 (C.A. 6th, 1959), involved approval by the Sixth Circuit of a twelve-year desegregation plan for Nashville, Tennessee. The principal issue in the case was whether this speed was too deliberate and the opinion dealt with the question at considerable length. It was finally concluded that it was a matter for the discretion of the trial judge. A petition for certiorari was

denied. 361 U.S. 924. The Chief Justice and Mr. Justices Douglas and Brennan were of the opinion that the writ should be granted, not on the question whether desegregation in Nashville should take six, eight, ten or twelve years, but limited to a consideration of the validity of a transfer provision. No member felt that this Court should take over the discretionary function of establishing the exact amount of permissible time for each city affected by the *Brown* cases.

Petitioners point out that there are cases in which either the District Court or the Court of Appeals has required a speed-up in the desegregation plan of a school board, though there is no case in which this Court has done so. In *Evans* v. *Ennis*, 281 F. 2d 385 (C.A. 3d, 1960), it was held that twelve years was too long for the desegregation of the Delaware schools. In that case the State School Board relied on *Kelley* v. *Board of Education of City of Nashville*, discussed above. The Court distinguished that case, however, on the ground that the problem was a much greater one in Nashville than in Delaware. The latter State had some 6,813 Negro school children, whereas Nashville had many more. (Atlanta has approximately 45,000.) The Court observed that in the first year of operation of the Delaware plan only 2.5% of the Negro children "available for desegregation" actually applied for admission to formerly all white schools. The Court then applied this percentage to the total number of Negro school children in the State and derived the number 170, representing the number of Negro children who would need to be assimilated into formerly all white schools if all twelve grades were desegregated at once. The problem is of a somewhat greater magnitude in Atlanta even as things

stood prior to the decision of the Court below in this case (and we are not referring to hostility to desegregation). We anticipate that it will be a great deal greater next fall. There are over 14,000 Negro children in the Atlanta high schools alone, and every one will be entitled to attend the school nearest his home, as was explained above. We do not know how many Negro children will need to be assimilated into formerly white schools, but our administrative problem is somewhat greater than Delaware's.

In *Jackson* v. *School Board of City of Lynchburg, Virginia,* 321 F. 2d 230 (C.A. 4th, 1963), it was held that a twelve-year desegregation plan was too slow for that city. That decision was made, of course, by the Court of Appeals and not this Court. Even then the matter was referred back to the District Court to determine how much faster the city could move. And in *Goss* v. *Board of Education,* 301 F. 2d 164 (C.A. 6th, 1962), a speed-up for Knoxville was ordered by the Court of Appeals. All these cases stand for is that the Courts to which the duty of supervision was delegated by the second *Brown* case thought that in the particular cases before them a little more, or a great deal more, speed could be generated.

There is not thereby created a conflict among the Circuits. Petitioners themselves pointed out that the Fifth Circuit too has urged haste at times. It did so in *Bosun* v. *Rippy,* 285 F. 2d 43 (C.A. 5th, 1960), and in *Davis* v. *Board of School Commissioners of Mobile County, Alabama,* 318 F. 2d 63 (C.A. 5th, 1963). The Fifth Circuit has, however, understood its duty to call for equitable flexibility while requiring as much speed toward the ultimate goal as practicable.

Thus, in the *Mobile* case in 1963 the Court remarked rather sharply upon the fact that "the amount of time available for the transition from segregated to desegregated schools becomes more sharply limited with the passage of the years since the first and second *Brown* decisions." 318 F. 2d at 64. On the same day it prescribed a twelve-year plan in *Stell* v. *Savannah-Chatham County Board of Education*, 318 F. 2d 425 (C.A. 5th, 1963).

It is clear, then, that the exact amount of time for the transition to desegregation may vary from city to city, and the determination of this question should be and has been left to the lower federal courts.

2. The Plan Will Achieve Total Desegregation.

Petitioners regard as "more invidious" than the time question just discussed the alleged fact that a denial of rights will persist after twelve years have elapsed. That is not true. Whatever the results might have been under the plan as originally adopted, it has been gradually modified, voluntarily, by the respondents in the direction of more effective desegregation. Any defects that may have existed just prior to the decision of the Court below would appear to be gone, as we explained earlier in this brief.

In the New Orleans case, *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491 (C.A. 5th, 1962), an order was issued requiring the abolition of a dual system of school zones. The same result was reached in *Augustus* v. *Board of Public Instruction of Escambia County, Florida*, 306 F. 2d 862 (C.A. 5th, 1962). In both of those cases, however, it was found that the desegregation plan was being used for the purpose of perpetuating segre-

gation. That is not the case with the Atlanta plan. In *Bush*, particularly, the trial court had pointed out that it did no good to apply a transfer plan without discrimination when all the applicants for transfer would be Negroes. But the Court was speaking in the context of an elaborate transfer system, with numerous vague and discretionary criteria that were subject to abuse. In Atlanta there is only one test, proximity to the school. (Except that if a child of any race wants to attend a school that is not near he will be required to justify it.)

Even if present assignments are kept, subject to transfer under the principles now required of the Atlanta Board and accepted by them, there will not be, in Atlanta, the vice inherent in the system condemned in *Bush* v. *Orleans Parish School Board,* supra. Atlanta will not be maintaining a dual system, for the desegregated grades. Any child may attend the school nearest his home merely by saying that it is his desire to do so. This cannot be called "discriminatory application" of the plan. The petitioners accepted an initial reassignment of all pupils back to their schools. (R. 31 et seq.) Assuming that feature of the plan is retained it is no more than good administration. It would not have the purpose, and could not have the effect, of preserving segregation.

As explained earlier, Atlanta has traditionally not had a rigid system of zones. They are not considered suitable, or educationally best, for the City. School zones are not necessary to the purpose of achieving desegregation.

3. The Courts Below Postponed the Question of Assignment of Teachers and

Other Staff. This Was a Proper Exercise of Discretion.

This case started on its way to this Court with the plaintiffs' application for further relief. It purports to be an attack upon the respondents' *application* of the desegregation plan. (See the Petition for Certiorari, *passim*, particularly Page 14.)

That plan, as approved by the District Court (as its prototype had been approved in the *Shuttlesworth* case, supra, by this Court) had been put into effect upon the motion of these petitioners. It contained no provision concerning assignment of teachers. This case cannot really be an attack upon the application of this plan.

Petitioners prosecute this action as a class action. Indeed, as petitioners observe (Petition for Certiorari, P. 11), the Fifth Circuit ruled in *Potts* v. *Flax*, 313 F. 2d 284 (C.A. 5th, 1963), a suit to desegregate the schools is a class action, whether the parties would have it such or no. The class these petitioners represent is described by them in paragraphs 3 and 4 of the complaint. (R. 3). They do not purport to represent Negro teachers or staff members.

Petitioners contend, however, that desegregated education for children requires that some action be taken regarding faculty and staff at this time. This Court has never so held. Prior to the first *Brown* decision it was customary in those school systems that were segregated to have segregated faculties. The Court in *Brown* v. *Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), based its rejection of the "separate but equal" doctrine of *Plessy* v. *Ferguson* upon the psychological impact upon Negro children of being

treated in a way that implied inferiority. The Court said nothing about the assignment of teachers. There is no hint in the record that anyone regards the Negro teachers in Atlanta as inferior to anyone, or that Negro children are affected in any ascertainable way by the assignments of teachers.

When the Court framed the implementation decree in *Brown* v. *Board of Education of Topeka,* 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955), it said nothing about the assignment of teachers.

Withal that, it may be that the Court would one day say something about assignment of teachers. The Fifth Circuit has steadily taken the position, as the District Judge did in this case, that the question of teacher segregation could be postponed because it would automatically be cured with the accomplishment of pupil desegregation. See *Augustus* v. *Board of Public Instruction of Escambia County, Florida,* 306 F. 2d 862 (C.A. 5th, 1962). This position is necessarily correct. When there no longer remains a segregated system there will be no Negro and white schools to which to assign teachers of the same race.

Up to now the lower federal courts have considered, in the main, that they were involved enough in the operation of schools dealing with pupil assignments. This Court has permitted them to hold that when they had a self-righting problem like teacher segregation they could give it the little time needed for the purpose.

Besides, the record shows some beginning on this matter by Atlanta on a voluntary basis. Negro "personnel" teachers work with white pupils as well as Negro. (R. 108). Negro and white teachers attend in-service

training courses on an integregated basis, sometimes taught by Negro "resource personnel," sometimes white. (R. 108).

THERE IS NO NEED FOR THIS COURT TO GRANT THE PETITION FOR WRIT OF CERTIORARI

The Court of Appeals for the Fifth Circuit has faithfully implemented the law as declared by this Court relating to desegregation. It has done so in this case.

This Court has recognized, in both of the *Brown* cases, in *Cooper* v. *Aaron,* and in all the other cases since, that a flexible approach is necessary to the problem of desegregation. It has delegated a broad discretion to the lower federal courts, while instructing them to require good faith and progress toward the goal on the part of local authorities.

There has been steady adherence to this wise policy. Certain momentous questions of constitutional principle have been brought up and decided. Local opposition and disagreement with *Brown* v. *Board of Education of Topeka,* 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), may not be allowed to defeat the requirements of the Constitution. *Cooper* v. *Aaron,* 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 19 (1958). A pupil placement plan may be used for the assignment or transfer of school pupils, so long as it be not used to perpetuate segregation rather than to accomplish desegregation or simply to manage the schools. *Shuttlesworth* v. *Birmingham Board of Education,* 358 U.S. 101, 79 S. Ct. 221, 3 L. Ed. 2d 145 (1958). Such a plan may have a variety of criteria governing assignments, but may not

have criteria based upon race, or which have the inevitable result of perpetuating segregation, such as the minority transfer provision invalidated in *Goss* v. *Board of Education of the City of Knoxville*, 373 U.S. 683, 10 L. Ed. 2d 632, 83 S. Ct. 1405 (1963). The unconstitutionality of segregated public education is no longer an open question; lower federal courts are bound by the decision in *Brown* and must require local school boards to submit a plan and proceed to the business of desegregation. *Davis* v. *Board of School Commissioners of Mobile County*, 84 S. Ct. 10 (1963), refusing to stay a mandate of the Court of Appeals for the Fifth Circuit requiring Mobile, Alabama, to begin desegregation.

Aside from these cases, this Court has left the implementation of the *Brown* principles to the lower courts. In particular, the Court has not even considered the question whether desegregating from the top down, or from the bottom up, is preferable, or whether any given number of years is the right or the wrong speed. Those questions are not matters of constitutional principle, but of equitable flexibility and the discretion of courts closer to the scene, as well as of the existence or not of good faith on the part of the local authorities.

The Court of Appeals for the Fifth Circuit has not been behindhand in carrying out its duty. For example, the minority transfer provision invalidated by this Court in *Goss* came up from the Sixth Circuit, where it had been approved in *Goss* v. *Board of Education*, 301 F. 2d 164 (C.A. 6th, 1962), and *Kelley* v. *Board of Education of City of Nashville*, 270 F. 2d 209 (C.A. 6th, 1959), cert. den. 361 U.S. 924. In the Fifth Circuit it was already invalid for the reason subsequently assigned by

this Court in *Goss*, that is, that it tended to perpetuate segregation, and it had been so held in *Bosun* v. *Rippy*, 285 F. 2d 43 (C.A. 5th, 1960).

Petitioners object, in this case, to the fact that the Court of Appeals did not order a speed-up of the Atlanta plan, which is a grade-a-year plan applicable this year to grades 8 through 12. It is clear, however, that the Court is acutely aware of the passage of time and did not decline to order a speed-up out of reluctance to enforce the principles of *Brown*. On the contrary, in *Bosun* v. *Rippy*, supra, the Court said (anticipating the remarks of this Court in *Watson*):

> "In so directing, we do not mean to approve the twelve-year, stair-step plan 'insofar as it postpones full integration.' See Evans v. Ennis, 3 Cir., 1960, 281 F. 2d 385, 389. The district court has not expressly passed on whether the speed is too deliberate. It retains jurisdiction of the action during the transition." 285 F. 2d at p. 47.

The Fifth Circuit Court of Appeals threatened, in *Davis* v. *Board of School Commissioners of Mobile County, Alabama*, 318 F. 2d 63 (C.A. 5th, 1963), to displace the discretion of the district judge if he showed himself tardy in requiring desegregation. And once again the Court took note of the passage of time since *Brown*. It is crystal clear, then, that the Fifth Circuit Court is not shirking its duty, nor is it recalcitrant, in the matter of desegregation, without being prompted by this Court. On the other hand, it continues to recognize the validity of the second *Brown* decision that these matters should be left in local hands, to the fullest extent possible, and

that equitable flexibility must be exercised by the lower courts.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

ATLANTA PUBLIC SCHOOLS
Administration Building
224 Central Avenue, S.W.
Atlanta 3, Georgia

Administrative Offices

December 6, 1963

Mr. A. C. Latimer
1203 Healey Building
Atlanta, Georgia

Dear Mr. Latimer:

In response to your request for further information I am supplying answers to specific questions as follows:

1. Upon what basis and authorization were Negro transfers allowed in 1963?

   In June, 86 Negro pupils were authorized transfer on the basis of probability of succeeding academically and upon their proximity to the school requested. However, in August, 1963, the factor or criterion of "probability of academic success" was removed and all students desiring to continue their application were transferred provided they lived closer to the predominantly white school requested. This new position was approved by the Board of Education on August 20, upon the recommendation of the Superintendent.

2. What were some comparisons in terms of number of transfers requested, number of transfers approved, and percentage of transfers approved in 1961, 1962, and 1963?

	1961	*1962*	*1963*
Number returning applications	135	263	191
Number authorized to transfer	10	40	119
Percentage	07%	15%	62%

3. Of the number applying for transfer in 1961, 1962, and 1963, how many were denied admission who, in fact, lived closer to the white schools requested than to the Negro schools in which they were currently enrolled?

	1961	*1962*	*1963*
Number applying	135	263	191
Number approved	10	40	119
Lived closer to present school	90	72	29
Lived closer to "white" school	35	151	43
Number denied living closer to "white" school	25	111	0*

* None denied who wished their application continued.

4. Are there instances or examples in which the Atlanta school system liberalized the Pupil Placement Plan or exceeded the tempo of desegregation prescribed by the plan, or otherwise demonstrated good faith in going beyond the minimum limits of the placement plan, in desegregation of the schools?

(a) At the outset only 3 of the 18 criteria were used because only 3 appeared to be practical and meaningful. In 1962, the only factors judged were "probability of academic success" and "proximity to the schools requested." In 1963, no factor was used except that of "proximity to the school requested."

(b) Students moving into the city requesting transfers to white schools on dates other than that specified by the pupil placement plan were allowed to enroll in predominantly white schools. (Example: Paula Sherwood moved here from New York and requested to enter West Fulton and the request was granted.)

White students requesting transfer to Negro schools were approved (Example: Charles Jerome Coleman to Washington.)

(c) Occasionally students are allowed to accelerate from the 7th to the 9th grade when these students are exceptionally brilliant. (Example: Michael Fears, a Negro student, was allowed to skip the 8th and move directly from the 7th to the 9th grade at predominantly white Fulton High School.)

(d) About 14 students were enrolled at Smith-Hughes, previously all white, last February without having to file application as prescribed in the Pupil Placement Plan.

(e) In the fall of 1963 all Negro applicants, qualifying for admission on the same basis as white, were admitted to Smith-Hughes Vocational School. The number enrolling is 334 adult students.

I hope this information is what you requested.

Sincerely yours,

RUAL W. STEPHENS
Deputy Superintendent

RWS:ejh

CORRECTED COPY

SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 623

FRED S. CALHOUN, *et al.*,

Petitioners,

—v.—

A. C. LATIMER, *et al.*,

Respondents.

PETITIONERS' RESPONSE TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Although the Fifth Circuit has ruled in *Augustus* v. *Board of Public Instruction of Escambia County*, 306 F. 2d 862, that the redrawing of school zone lines on a nonracial basis is a minimum requirement in every school desegregation plan, respondents say on page 11 of their brief in opposition, "We would still oppose the drawing of school zones by a Court or even the school authorities". This minimal requirement for desegregation has been adopted by the Sixth Circuit, *Northcross* v. *Board of Education of Memphis*, 302 F. 2d 818, and the Fourth Circuit. *Jones* v. *School Board of City of Alexandria*, 278 F. 2d 72, 76. The majority opinion below does not require Atlanta to follow the *Augustus* case in this respect. It was for this reason that Judge Rives in his dissenting opinion characterized the majority opinion as a step backward for the Fifth Circuit.

The obvious reason for this minimum requirement is the eventual elimination of initial assignments to schools based on race with Negro children thereafter enjoying only an opportunity to apply for transfer out of a Negro school into a white school. *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491 (5th Cir. 1962). However, there being no directive in the majority opinion to the Atlanta school authorities to abolish the dual zones, which respondents now admit exist (see pp. 11-12 of Respondents' Brief), the Atlanta plan is still one providing for initial racial assignments and dual zones. Another setback for the Fifth Circuit.

Respondents read into the majority opinion below a requirement that beginning in September 1964 (when the present plan will be effective as to grades 8-12, in that it will permit students in these grades to apply for transfer to other schools) every child in grades 8-12 will have the right to attend the school nearest his home. Petitioners do not so read the opinion of the majority. The majority opinion requires only that the present pupil assignment criteria of the plan be applied to all students entering the high schools for the first time (eighth grade where the feeder system takes hold) and to all students new to the system entering a desegregated grade and to first grade pupils when the plan eventually reaches that grade (Appendix to Petition 22a and 40a). There is no ruling that pupils in grades 9-12 are now entitled to attend the schools nearest their homes, as claimed by respondents. A further setback for the Fifth Circuit.

The crucial fact which cannot be gainsaid is that three years of desegregation in Atlanta, one of the largest cities in the south, has resulted in less than 150 Negro children out of a total school enrollment of approximately 106,000 (57,500 white and 48,000 Negro) transferring to white schools without any order from the District Court or the

Court of Appeals to speed the desegregation process. Moreover, the majority opinion approves a grade-a-year pupil assignment plan, still another setback for the Fifth Circuit, *Boson* v. *Rippy*, 285 F. 2d 43 (5th Cir. 1960), which has brought about this meager result and does not require any speeding up of the plan despite this Court's clear admonition to the District Court, *Watson* v. *City of Memphis*, 373 U. S. 526, and *Goss* v. *Board of Education*, 373 U. S. 683.

Respondents say that the atmosphere in Georgia has changed from one of massive resistance to acceptance of this Court's decision in the *Brown* case, and for this reason certiorari should be denied in this case. Yet, it should be clear to all that in former massive resistance states the only way to insure compliance with the Fourteenth Amendment against interference by either state officials, *Cooper* v. *Aaron*, 358 U. S. 1, or individuals, *Hoxie* v. *School Board*, 137 F. Supp. 364 (D. C. Ark. 1956), aff'd 238 F. 2d 91 (8th Cir. 1956) is to insulate school authorities against such interference by the orders of lower federal courts. The school desegregation record throughout the south to date makes plain that so far only constant pressure brings progress, notwithstanding the good faith of the school authorities. And as the Fifth Circuit said in *Borders* v. *Rippy*, 247 F. 2d 268, 272: "Faith by itself, however, without works, is not enough. There must be 'compliance at the earliest practicable date' ".

CONCLUSION

For the additional foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
FEB 15 1964
JOHN F. DAVIS, CLERK

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BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

Opinions Below

The District Court's opinion denying further relief and from which an appeal was taken to the court below is reported at 217 F. Supp. 614 and printed in the record at page 156.

Prior Findings of Fact, Conclusions of Law, Orders and Judgments of the United States District Court for the Northern District of Georgia, Atlanta Division (R. 9, 18, 38, 43, 47, 48, 160, 165) are reported at 188 F. Supp. 401 and 188 F. Supp. 412.

The opinions of the United States Court of Appeals for the Fifth Circuit, modifying and affirming the decision of the District Court and denying petitioners' petition for rehearing *en banc* are printed in the record at 229, 258 and reported at 321 F. 2d 302.

Jurisdiction

The judgment of the Court of Appeals was entered on June 17, 1963 (R. 254). Application for rehearing *en banc* was denied on August 16, 1963 (R. 259). The petition for writ of certiorari was filed November 14, 1963 and granted January 13, 1964. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1254(1).

Constitutional Provision Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Question Presented

Respondent school authorities operate a biracial system which, under court order, now allows children to transfer to schools for the other race upon satisfying seventeen pupil assignment criteria, leaving the dual system otherwise intact. This limited opportunity to transfer has been given on a twelve year descending grade-a-year basis and is now enjoyed by children in the 12th, 11th, 10th and 9th grades. In 1972 children will still have only this limited right. Does not *Brown* v. *Board of Education* impose upon respondents the affirmative duty to (a) reorganize the schools into a unitary non-racial system, and (b) to do so much more quickly than in twelve years?

Statement

For approximately four years subsequent to this Court's decision in *Brown* v. *Board of Education of Topeka*, 347 U. S. 483, the public schools of Atlanta remained segregated,

while Negro parents vainly petitioned local school authorities for redress (R. 4, 163).

Then, on January 11, 1958, petitioners, parents of Negro school children, brought suit in the U. S. District Court for the Northern District of Georgia, seeking desegregation of Atlanta's public school system. The Court found that a biracial school system existed; therefore, the Court ordered respondents to submit a plan for desegregation by December 1, 1959, which they did. The plan was approved by the District Court on January 20, 1960. 188 F. Supp. 401, 412.

The plan called for the imposition of a racial transfer procedure upon the existing biracial school structure (R. 61-63). Individual transfer applications were to be judged by the Board on the basis of 17 pupil assignment criteria (R. 33-34). The plan was to commence in the 12th and 11th grades in September, 1961 and was to proceed on a grade-a-year basis, in descending order, thereafter (R. 47). All those students in grades below those in which the plan operated were to remain segregated.

Between May 1st and 15th, 1961, pursuant to the plan, 129 Negro students in grades 11 and 12 returned application forms for transfer to white high schools (R. 65). Of these, school authorities admitted 10 to four formerly all-white high schools (R. 68).

The pupil assignment criteria were applied only to those applicants, all Negroes, seeking transfer during the May 1st-15th period to schools attended by pupils of the opposite race. All other applications for transfer, whites to white schools and Negroes to Negro schools, were considered "informal" transfers and were made throughout the school year (R. 94-96).

On April 30, 1962, after the plan's first year of operation petitioners moved the district court for further relief (R.

53). They claimed that the plan, which had been approved over their numerous objections, had not resulted in desegregation (R. 56-57). They prayed for not only a new plan to speed up desegregation, but for one providing prompt reassignment and initial assignment of all students on some reasonable non-racial basis, e.g., the drawing of a single set of attendance area lines for all schools without regard to race or color to replace the dual scheme of school attendance area lines for Negro and white schools. Petitioners further claimed that the *Brown* case contemplated the reassignment of teachers on a non-racial basis and the elimination of all other racial distinctions in the operation of the school system (R. 56). In short, the petitioners sought integration of the dual school system into a unitary non-racial system, and with greater speed.

In September, 1962, 44 out of 266 Negro applicants were admitted to grades 10, 11 and 12 (R. 94). On November 15, 1962, petitioners' motion for further relief was denied (R. 156). 217 F. Supp. 614. The District Court (Hooper, District Judge) held (R. 157):

> There is no disputing that discrimination had existed prior to the Order of this Court of January 20, 1960, and that the Order of that date was designed to eliminate the discrimination over a period of years. Even plaintiffs' counsel upon the original trial disclaimed any purpose of seeking to have "wholesale integration." The only question then involved was the plan by which discrimination could be eliminated; a Plan was carefully prepared and adopted and no appeal taken. The Plan is eliminating segregation, but until it has completed its course there will of course still be areas (in the lower grades) where segregation exists. The Court is therefore at a loss to see how anything could be accomplished at this time by "an order enjoining

defendants from continuing to maintain and operate a segregated biracial school system", for the Court has already taken care of that in its decree of January 20, 1960.

Petitioners appealed to the Court of Appeals for the Fifth Circuit which (2-1),[1] on June 17, 1963, affirmed.

The Court, *per* Griffin B. Bell, Circuit Judge, recognized that the "bare bones" (R. 239) of the case was petitioners' prayer for desegregation through the drawing of school zone lines for each school on a non-racial basis and the assignment of all children living in the zone to the school without regard to race or color. Judge Bell denied petitioners' prayer, saying (R. 240), "the Atlanta plan of abolishment is one of gradualism by permitting transfers from present assignments." Judge Bell found no inconsistency between his decision and the decisions of this Court in *Brown* v. *Board of Education of Topeka*, 347 U. S. 483; *Brown* v. *Board of Education of Topeka*, 349 U. S. 294; *Cooper* v. *Aaron*, 358 U. S. 1; *Watson* v. *City of Memphis*, 373 U. S. 526; *Goss* v. *Board of Education of the City of Knoxville*, 373 U. S. 683; or the decisions of his own circuit, *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491 (5th Cir. 1962); *Augustus* v. *Board of Public Instruction*, 306 F. 2d 862 (5th Cir. 1962); or the decisions of the Fourth Circuit, *Jones* v. *School Board of the City of Alexandria*, 278 F. 2d 72 (4th Cir. 1960); or the decisions of the Sixth Circuit, *Northcross* v. *Board of Education of the City of Memphis*, 302 F. 2d 818 (6th Cir. 1962). Judge Bell concluded (R. 242-243) that "the dual system will be entirely eliminated when the plan reaches the first grade. . . . So considered, we hold that there is insufficient evidence on which to base a determination that the start made in the

[1] The Court consisted of Judges Bell and Rives and David T. Lewis of the 10th Circuit, sitting by designation.

Atlanta schools is not reasonable, or that the plan is not proceeding toward the goal at deliberate speed."

Circuit Judge Richard T. Rives, in his dissent, found an inconsistency between the majority opinion and the prior applicable decisions of this Court. He also demonstrated that the opinion of the court was "a backward step" (R. 246) for the Fifth Circuit, which had previously required New Orleans, Louisiana and Pensacola, Florida to do far more toward insuring full compliance with this Court's school desegregation decisions, *Bush* v. *Orleans Parish School Board, supra, Augustus* v. *Board of Public Instruction, supra.* He concluded that until a start was made in abolishing the dual system of schools, whereby all white children went initially to white schools and all Negro children initially to Negro schools, no plan of selective transfer from formerly Negro to formerly white schools would fully satisfy the requirements of the *Brown* decision. Moreover, Judge Rives concluded that the Atlanta Plan does not now meet the requirements of deliberate speed. In this regard he declared (R. 253):

> Enjoined as we are to give fresh consideration to the element of timing in these school cases by the Supreme Court's latest pronouncement on the subject in [*Watson* v. *City of Memphis*, 373 U. S. 526] and, following the *Watson* decision, in *Josephine Goss et al.* v. *Board of Education, City of Knoxville, Tenn., et al.*, [373 U. S. 683], I cannot concur in a decision of this Court that takes a backward rather than a current, much less forward, step.

Rehearing was denied (2-1) on August 16, 1963 (R. 258-259).

Petitioners filed a petition for writ of certiorari on November 14, 1963, which was granted on January 13, 1964 (R. 260).

ARGUMENT

The Plan Erroneously Approved Below Does Not Conform to the Mandate of This Court; the Plan Desegregates Too Little, Too Late.

1. *The Transfer Plan Is Not an Effective Vehicle for Desegregation Because It Preserves the Biracial School Structure.*

The end result of Atlanta's plan has been that in Atlanta's public schools, a decade after the first *Brown* decision, 145 out of a total of 56,000 Negro students have been permitted to attend school with 58,000 white students.[2] In short, tokenism has been now superimposed upon so called separate but equal.[3] Petitioners submit that tokenism does not satisfy the Fourteenth Amendment mandate of equal protection of the laws.

Prior to September, 1961, Atlanta had a dual school system (R. 157). There was one system of schools for white pupils and a separate system of schools for Negro pupils. In September, 1961, a plan purporting to cure this constitutional infirmity was instituted. The adequacy of this plan must now be examined by this Court in the light of this Court's decisions.

---

[2] Southern Education Reporting Service, *Statistical Summary of School Segregation-Desegregation in the Southern and Border States* (1963-1964), p. 17.

[3] Separate and *un*equal would be a more accurate characterization, for the school facilities for Negroes are in fact unequal to those for whites. Negroes constitute 49% of the school population, but they have been allotted only 33% of the school buildings and 40% of the teachers and principals; as a result, they suffer serious overcrowding in certain schools and have higher pupil-teacher ratios (R. 101).

Petitioners start with the incontrovertible proposition that segregation in Atlanta's schools exists unimpaired except as modified by the racial transfer plan.[4]

The plan provides for transfers on an individual basis for those students who satisfy 17 pupil placement criteria (R. 33-34).[5] Respondents judge the individual applications of Negroes, reject most,[6] and permit a nominal number to transfer. In practice, the structure of segregation remains unaltered—with a new facade.

In theory, as well, the plan is devoted to the promotion of token desegregation. The theory is to place the burden of leveling the structure on each individual school child. The child must procure a transfer application, prepare and submit it. If rejected for any of a number of vague reasons, the child must protest to the Board and then apply to the court for relief (R. 233). In court, the child must show a discriminatory application of the plan. It is painfully apparent that the plan calls for a war of attrition, in which only the hardiest will be able to bear the burden of a contest with state power. Moreover, the theory not only depends upon enmeshing each child in an administrative net, but depends as well upon clothing respondents—admitted wrongdoers—with practically unreviewable discretion over the quality and extent of their own reformation. The theory of the plan is to allow respondents to place a high price tag on the exercise of the constitutional

---

[4] R. 61-63; Majority opinion, Footnote 4 (R. 240); dissenting opinion, Footnotes 4, 5 (R. 250-251).

[5] The 17 criteria are identical with those of the Alabama Pupil Assignment Law upheld as constitutional on its face in *Shuttlesworth* v. *Birmingham Board of Education*, 358 U. S. 101, affirming 162 F. Supp. 372 (N. D. Ala. 1958). Here, of course, the case involves the *application* of such a plan, not its surface plausibility.

[6] 119 out of 129 applicants were rejected in 1961 (R. 68); 222 out of 266 applicants were rejected in 1962 (R. 94).

right to attend desegregated public school facilities; the theory is to recognize a paper, not a present, right. The theory works and the result is, not unexpectedly, a system of token desegregation.

This Court did not hold in *Brown* v. *Board of Education* that the vice of total segregation could be cured by the device of token desegregation. This Court decreed the abolition of the biracial school system. That system retains its pristine strength today in Atlanta's grades 1-8; in grades 9-12, the essential structure of the biracial school system perdures.

This Court's decisions interdict the tokenism countenanced by the Atlanta plan. *Brown II* is perfectly explicit in its command that a prompt and reasonable start be made "to achieve a system of determining admission to the public schools on a nonracial basis" (349 U. S. at 300-301). What *Brown* requires is elimination, not modified retention, of the biracial school structure. In this context, what was said in *Cooper* v. *Aaron*, 358 U. S. 1, 17, is significant:

> In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers or nullified indirectly by them through an evasive scheme for segregation whether attempted "ingeniously or ingenuously." *Smith* v. *Texas*, 311 U. S. 128, 132, 85 L. Ed. 84, 87, 61 S. Ct. 164.

The decision below also conflicts sharply with decisions in the Fifth Circuit and in the Fourth and Sixth Circuits.

Judge Rives, in dissent below, correctly noted that the instant decision is an unwarranted retreat from the position taken in *Augustus* v. *Board of Public Instruction*, 306

F. 2d 862 (5th Cir. 1962) and *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491 (5th Cir. 1962).

Both decisions unquestionably stand for the proposition that it is the dual school system itself which must be abolished and that the window dressing of a transfer plan is not a permissible substitute for the outright abolition of the system.

In *Bush*, as here, the Court of Appeals was presented with a pupil placement system which purported to be a vehicle for school desegregation. In *Bush*, the court rightly exposed the system as a sham. The Court said:

> This Court, like both Judge Wright[7] and Judge Ellis,[8] condemns the Pupil Placement Act, when, with a fanfare of trumpets, it is hailed as the instrument for carrying out a desegregation plan, while all the time the entire public knows that in fact it is being used to maintain segregation by allowing a little token desegregation. . . . The Act is not an adequate transitionary substitute in keeping with the gradualism implicit in the "deliberate speed" concept. It is not a plan for desegregation at all. 308 F. 2d at 499-500.

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[7] The Court set forth and approved Judge Wright's statement:

> To assign children to a segregated school system and then require them to pass muster under a pupil placement law is discrimination in its rawest form. 308 F. 2d at 498.

[8] The Court set forth and approved Judge Ellis' statement:

> . . . It goes without saying that although "[the] school placement law furnishes the legal machinery for an orderly administration of the public schools in a constitutional manner," . . . "[the] obligation to disestablish imposed segregation is not met by applying placement assignment standards, educational theories or other criteria so as to produce the result of leaving the previous racial situation existing as it was before" . . . It does no good to say that the pupil placement law is applied solely to transferees without regard to race when the procedure is so devised that the transferees are always Negroes. 308 F. 2d at 498.

Augustus is in accord. There it was said: "There cannot be full compliance with the Supreme Court's requirements to desegregate until all dual school districts based on race are eliminated" (306 F. 2d at 869).

Pupil placement plans superimposed upon biracial school structures have been similarly discarded in the Fourth[9] and Sixth[10] Circuits.

In *Northcross*, as here, the pupil assignment system continued to assign Negroes to Negro schools and whites to white schools, except as modified by the transfer plan. The

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[9] *Jones* v. *School Board of the City of Alexandria*, 278 F. 2d 72, 76 (4th Cir. 1960); *Green* v. *School Board of the City of Roanoke*, 304 F. 2d 118 (4th Cir. 1962).

It is possible that pupil placement plans or laws as a vehicle for school desegregation have some vestigial vitality in the Fourth Circuit, but their effectiveness for this purpose has been attenuated by the requirement that transfers be freely given. *Jeffers* v. *Whitley*, 309 F. 2d 621 (4th Cir. 1962). The question in *Jeffers* was whether a system of racial assignments could cure the constitutional infirmity of a biracial school system. The Court found that this could not be so if the system were not completely voluntary. The Court said:

> [I]f a voluntary system is to justify its name, it must, at reasonable intervals, offer to the pupils reasonable alternatives, so that, generally, those who wish to do so may attend a school with members of the other race. 309 F. 2d at 627.

In other words, transfers must be "had for the asking" (309 F. 2d at 628). The *Jeffers* solution still left the administrative burden on the individual school child to apply to the School Board for that to which he was entitled as of right. However, the Court threw doubt on this vestige of the pupil placement law by saying:

> There can be no freedom of choice if its [the transfer request's] exercise is conditioned upon exhaustion of administrative remedies which, as administered, are unnegotiable obstacle courses. 309 F. 2d at 628.

Pending before the Fourth Circuit is the issue of whether the administrative burden may continue to be placed on each individual school child to level the biracial school structure. See *Farmer* v. *Greene County Board of Education*, 4th Cir., No. 9125, now being reconsidered *en banc*.

[10] *Northcross* v. *Board of Education of the City of Memphis*, 302 F. 2d 818 (6th Cir. 1962).

School Board argued that the transfer provisions created a voluntary system and that therefore, there was no compulsory segregation of the races. The Court of Appeals dismissed this and similar contentions saying (302 F. 2d at 823):

> Minimal requirements for non-racial schools are geographic zoning according to the capacity and facilities of the buildings and admission to a school according to residence as a matter of right. "Obviously the maintenance of a dual system of attendance areas based on race offends the constitutional rights of the plaintiffs and others similarly situated and cannot be tolerated." *Jones* v. *School Board of City of Alexandria, Virginia*, 278 F. 2d 72, 76, C. A. 4.

That Court concluded (302 F. 2d at 823):

> Negro children cannot be required to apply for that to which they are entitled as a matter of right.

The reasons assigned for holding the transfer provisions an insufficient vehicle for reorganizing the schools on a nonracial basis were essentially practical. The reasons stemmed from an appreciation of the hard fact that shifting the administrative burden of desegregation to each individual school child ineluctably results in token desegregation.

The Court found (302 F. 2d at 823):

> Any pupil through both parents may request a transfer, but in the final analysis it is up to the School Board to grant or reject it. Although an appeal may be taken into the courts it would be an expensive and long drawn out procedure with little freedom of action on the part of the courts. In determining requests for transfers the Board may apply the criteria heretofore

> mentioned. None of these criteria is based on race, but in the application of them, one or more could always be found which could be applied to a Negro. The denial of the transfers herein referred to is significant of the practical application of the transfer provisions of the law.

In short, *Northcross* persuasively demonstrates that the responsibility for initiating and effectuating desegregation rests upon the school authorities and that these authorities cannot shift their responsibilities to others. Especially is that true when that shifting of responsibility operates to inhibit desegregation.

The short of petitioner's submission is that the Atlanta plan is ineffective to transform the biracial system into a unitary nonracial system in accordance with the decisions of this Court. The remedy is not to strike at the branches of the evil, but at its root. In this case, the root of the evil is the biracial school structure itself. That structure must be removed in favor of some reasonable nonracial system of pupil assignment.

2. *The Delay Countenanced by the Plan Is Unwarranted.*

Not only must a unitary system be established, but it must come with greater celerity than 12 years. Petitioner's plan for moderate acceleration to 6 years (1960-1965) (R. 82-83) should have been approved by the court below. If this had been done, desegregation would today be on the verge of completion.

Petitioners submit that this Court's recent admonition in *Watson* v. *City of Memphis*, 373 U. S. 526, not only authorized but compelled such acceleration. Mr. Justice Goldberg speaking for the Court in *Watson* said:

> [T]he second Brown decision, 349 U. S. 294, 75 S. Ct. 753, which contemplated the possible need of some limited delay in effecting total desegregation of public schools, must be considered . . . in light of the significant fact that the governing constitutional principles no longer bear the imprint of newly enunciated doctrine. . . . [W]e cannot ignore the passage of a substantial period of time since the original declaration of the manifest unconstitutionality of racial practices such as are here challenged, the repeated and numerous decisions giving notice of such illegality, and the many intervening opportunities heretofore available to attain the equality of treatment which the Fourteenth Amendment commands the States to achieve. These factors must inevitably and substantially temper the present import of such broad policy considerations as may have underlain, even in part, the form of decree ultimately framed in the Brown case. Given the extended time which has elapsed, it is far from clear that the mandate of the second Brown decision requiring that desegregation proceed with "all deliberate speed" would today be fully satisfied by types of plans or programs for desegregation of public educational facilities which eight years ago might have been deemed sufficient. Brown never contemplated that the concept of "deliberate speed" would countenance indefinite delay in elimination of racial barriers in schools . . . 373 U. S. at 529-30.

That standards for desegregation plans adequate in 1955 are no longer adequate—and that it is time for a second look at the rate of desegregation—was reemphasized by Mr. Justice Clark in *Goss* v. *Board of Education of the City of Knoxville*, 373 U. S. 683, 689:

> Now however, eight years after this decree [*Brown II*] was rendered, and over nine years after the first Brown decision, the context in which we must interpret and apply this language to plans for desegregation has been significantly altered.

The Courts of Appeals have also shown great impatience with the all-too-deliberate-sloth of the 12-year plans. Four circuits—the Third,[11] Fourth,[12] Fifth[13] and Sixth[14]—have now invalidated "grade-a-year" plans.

"These decisions make perfectly plain that the burden was on respondents here to show that the delay attendant upon the "grade-a-year" feature of the plan was imperatively and compellingly unavoidable. No such showing was made.

Moreover, these decisions dictate that respondents should not now be treated as those school boards which made a prompt and reasonable start in 1955.

3. *A Prompt and Reasonable Start Should Be Made Toward Desegregation of the School Personnel.*

Another major prop of the segregated school system which the majority opinion leaves standing is the segregated staff. As all the world knows, in Atlanta, as elsewhere, school segregation not only consists of having a Negro child in every seat in a Negro school but in having a Negro teacher in front of every Negro class. Moreover,

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[11] *Evans* v. *Ennis*, 281 F. 2d 385 (3d Cir. 1960).

[12] *Jackson* v. *School Board of The City of Lynchburg*, 321 F. 2d 230 (4th Cir. 1963).

[13] *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491, 500, 501-502 (5th Cir. 1962).

[14] *Goss* v. *Board of Education of the City of Knoxville*, 304 F. 2d 164 (6th Cir. 1962), reversed on other grounds, 373 U. S. 683.

Atlanta goes so far as to put all Negro schools under the direction of a Negro supervisor (R. 72).

The District Court, in this case, indefinitely postponed consideration of the assignment of Negro teachers on a nonracial basis. Such deferment is *per se* contrary to this Court's admonitions in *Watson* and *Goss* that the time has come for full compliance with this Court's directive to put an end to jerry-built devices for preserving segregation.

And recently the Court of Appeals for the Fifth Circuit decreed that the practice of assigning teachers by race falls within the *Brown* proscription against the continuation of racial distinctions in the public school system. *Board of Public Instruction of Duval County* v. *Braxton*, 5th Cir., No. 20294, January 10, 1964.

4. *Unreversed, the Majority Opinion Dictates That Soon Another Generation of Negro Students Will Graduate From Atlanta's Public School System With the Promise of Equality Made in 1954 Unredeemed.*

The majority opinion's approval of Atlanta's policy of tokenism and delay cannot be squared with the proposition that the constitutional right to attend a desegregated public school system is a *present* right. This court recently said in *Watson*:

> [T]he delay countenanced by *Brown* was a necessary albeit significant adaptation of the usual principle that any deprivation of constitutional rights calls for prompt rectification. The rights here asserted are, like all such rights, *present* rights; they are not merely hopes to some *future* enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now, and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled. 373 U. S. at 532-33.

The result of the majority opinion is not only inconsistent with the great promise of equality envisioned by this Court's 1954 decision, but it also jeopardizes the forward progress made to date. Three other major school districts —Savannah, Georgia, Birmingham, Alabama, and Mobile County, Alabama—ordered to commence desegregation in September, 1962, by the Fifth Circuit, pending appeal, immediately adopted the Atlanta plan which had just been approved. As a result, Savannah admitted 21 Negro students to the 12th grade out of a school population of 24,013 whites and 15,336 Negroes. Birmingham admitted 5 to the 12th grade out of a school population of 37,500 whites and 34,834 Negroes. Mobile County admitted 2 to the 12th grade out of a school population of 47,247 whites and 30,020 Negroes.

Unreversed, the majority opinion supports the proposition that token desegregation conforms to the mandate of equal protection of the laws. This erroneous and mischievous doctrine requires prompt expunction by this Court.[15]

[15] See Bickel, *The Decade of School Desegregation*, 64 Columbia Law Review 193 (1964), particularly pp. 208-211.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

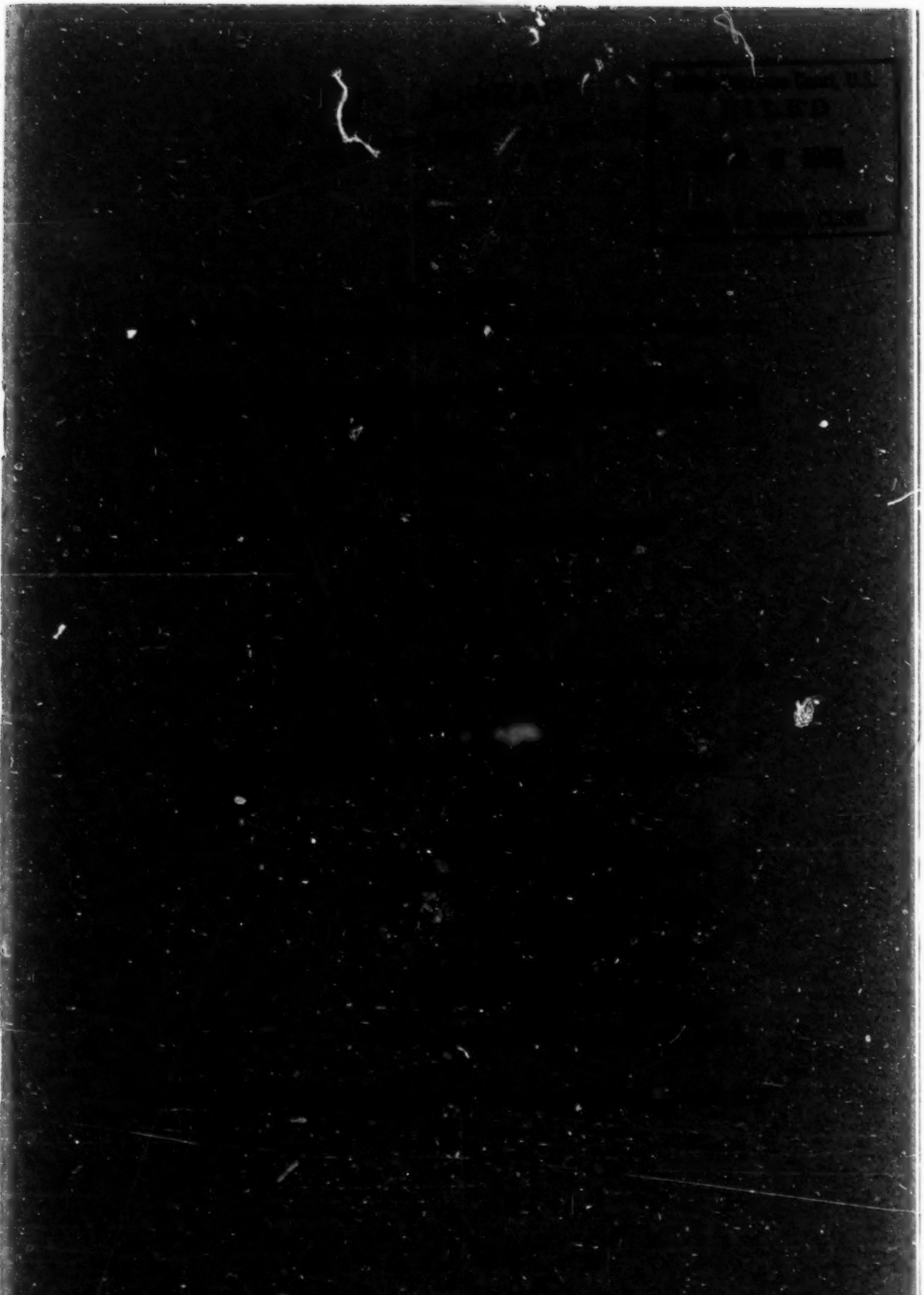
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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 623

FRED S. CALHOUN, ET AL., PETITIONERS

v.

A. C. LATIMER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinions of the court of appeals (R. 229–254, 258–259) are reported at 321 F. 2d 302. The opinions of the district court (R. 160–165, 18–30, 48–53, 156–160) are reported at 188 F. Supp. 401, 412; 217 F. Supp. 614.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1963 (R. 254), and a petition for rehearing *en banc* was denied on August 16, 1963 (R. 259). The petition for a writ of certiorari was granted by this Court on January 13, 1964 (R. 260). The jurisdiction of the Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Atlanta plan of school desegregation, initiated three years ago, proceeds at the pace of one grade a year, beginning with the twelfth grade and progressing downward; it perpetuates a dual school system, in which assignments are originally made on the basis of race, and permits transfers only to the school most proximate to the student's residence; and it preserves total segregation of school personnel.

The question presented is whether such a plan proceeds "with all deliberate speed" and is calculated to achieve complete desegregation "at the earliest practicable date."

INTEREST OF THE UNITED STATES

The effective implementation of this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483, is a matter of continuing national concern. The government has accordingly participated in the prior school cases which have come before this Court. The instant case is of general significance in that it is the first to involve broadly the merits of a school desegregation plan.

STATEMENT

A. THE ORIGINAL DESEGREGATION PLAN

This action was initiated on January 11, 1958, by Negro pupils and their parents to desegregate the public schools of Atlanta, Georgia (R. 2).[1] Nearly

[1] Negro citizens of Atlanta had started to petition the Board of Education to desegregate the public school system almost three years earlier in 1955 (R. 4–5).

eighteen months later, on June 5, 1959, the case came on for trial (R. 9), and on June 16, 1959, the district court rendered an opinion in which it found that racial discrimination existed in the operation of the Atlanta schools (R. 160–162).[2] The court said that it was "compelled to enjoin racial discrimination" and gave the school board an opportunity to submit "a plan whereby racial discrimination will be discontinued" (R. 164, 165).

On July 9, 1959, the district court issued an order enjoining the respondents from "enforcing and pursuing * * * racial segregation in the operation of the public schools of the City of Atlanta, and from engaging in any and all action which limits or affects admission to, attendance in, or education of" Atlanta's Negro students in that City's schools (R. 9). The court ordered respondents to submit a plan for desegregation by December 1, 1959, "contingent upon the enactment of [State] statutes permitting such plan to be put into operation" (R. 9). The court also indicated that its judgment was not final and that it would retain jurisdiction of the case (R. 10).[3]

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[2] The school board contended that the racial "separation" arose through the choice of the Negroes themselves (R. 162).

[3] The order provided (R. 10): "This Judgment of the Court is not a final Judgment in the case and the Court retains jurisdiction of this cause for the purpose of entering such further orders or granting such further relief as may be necessary to bring about compliance with this decree and during such time as may be necessary to put into effect the defendants' plan."

1. APPROVAL OF THE PLAN

On December 1, 1959, the day on which the period for submitting a plan expired, respondents tendered their proposal to the court (R. 10–16). After citing various administrative problems faced by the school board—such as rapid urbanization, influx of children of varying achievement and ability, new school construction, shortage of classrooms (R. 10–12)—the plan provided that "[i]n the assignment, transfer or continuance of pupils" the Superintendent of schools should consider eighteen criteria (R. 12–13). These criteria were substantially identical to those of the Alabama pupil assignment law upheld as constitutional on its face in *Shuttlesworth* v. *Birmingham Board of Education,* 358 U.S. 101, affirming 162 F. Supp. 372 (N.D. Ala.).[4] The plan authorized the Superintendent to require interviews with pupils or their parents and to conduct such examinations and investigations as he deemed appropriate (R. 14). A fifteen-day period was established in which transfer

[4] Among the criteria were "the psychological qualification of the pupil for the type of teaching and associations involved," "the possibility of breaches of the peace or ill will, or economic retaliation within the community," "the home environment of the pupil," and "the morals, conduct, health and personal standards of the pupil" (R. 12–13). Some of these criteria were eliminated by court order or suggestion; others have been voluntarily abandoned by the respondents. While various of these factors were applied in each year the plan has operated, only one factor—not included in the original plan—is currently considered when a pupil applies for a transfer, *viz.* proximity to the school to which transfer is requested (Br. in Opp. 10–11, 27–28). See also p. 13 below.

requests could be submitted each year (R. 13) and a procedure for administrative appeal and review was prescribed (R. 14–16). The plan stated that "[a]ll existing school assignment shall continue without change until or unless transfers are directed or approved by the Superintendent or his duly authorized representative" (R. 13). Finally, the plan provided that it would begin to operate in the twelfth grade on "September 1, 1960, or on September 1, following favorable action by the General Assembly of Georgia," and "each successive year, the plan shall be expanded to the immediate lower grade" (R. 16).

On December 12, 1959, petitioners filed objections to the plan (R. 17), and a hearing was held on these objections on December 14, 1959 (R. 200–228). At the hearing, petitioners objected to the plan's failure to eliminate the dual school system (R. 201), its continued assignment of Negro children on the basis of race, and its imposition of the burden of transferring on the Negro children (R. 214). They explained that (R. 214):

> [T]he school authorities are required to assign some Negro children to white schools; and that this is the only way in which the school authorities meet their duty to desegregate. What they have done is to shift the duty to the Negro community once again and say now I have reassigned you on a basis of race, where it is your duty to come forward again and try to get out. We think that the initial assignment on the basis of race is unconstitutional. * * *

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Petitioners also complained that respondents had not demonstrated the need for a period of twelve years in which to accomplish desegregation (R. 208–209)[5] and that the plan did not provide for the assignment of school personnel without regard to race (R. 213).[6]

These objections were rejected by the district court on December 30, 1959 (R. 18). The court noted that (R. 19):

> Essentially the Plan contemplates that all pupils in the schools shall until and unless transferred to some other school, remain where they are, all new and beginning students being assigned by the Superintendent or his authority, to a school selected by observance of certain standards as set forth in the proposed Plan.

However, other objections of the petitioners to the plan, which are not pertinent to the issues here, were sustained by the court, and respondents were ordered to amend the plan (R. 30). An amended plan was submitted (R. 32), which was approved by the court on January 20, 1960 (R. 38).

2. IMPLEMENTATION OF THE PLAN

On February 26, 1960, petitioners filed a motion for further relief in which they requested that the plan be ordered into effect on May 1, 1960, despite the fact that the Georgia Legislature had adjourned without

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[5] The district court responded that it was its intention "to put just as much emphasis on the deliberation as it does on the speed" (R. 221).

[6] Other objections to the plan, not pertinent to the issues here, were also made.

amending or repealing any of the Georgia laws which provided for closing or withholding State funds from schools in which races were mixed (R. 38–43). On March 9, 1960, the district denied the motion, but ordered that a hearing be held (R. 43–47).[7] On May 9, 1960, following the hearing, the court postponed implementation of the plan until the fall of 1961, but required that it then be applied to both the eleventh and twelfth grades (R. 47–48).

3. OPERATION OF THE PLAN IN 1961

The plan was inaugurated in 1961. Between May 1 and May 15, 1961—the only period during which transfer requests under the plan could be submitted (R. 35)[8]—approximately 300 white and Negro students in the eleventh and twelfth grades requested

[7] On March 9, 1960, the petitioners filed a notice of appeal from the district court's order entered that day (R. 174, 176). On March 24, 1960, petitioners moved to dismiss the appeal (R. 173–174). Pursuant to court order (R. 174–175), the motion to dismiss was amended on April 2, 1960, at which time petitioners explained that "in light of the fact that the court set May 9th, 1960 as the date for hearing plaintiffs' motion for further relief, plaintiffs decided to withdraw the appeal and to proceed with the hearing on May 9, 1960" (R. 176). On April 5, 1960, the district court granted the motion to dismiss the appeal (R. 176).

[8] Applications of whites for transfers to "white schools" and Negroes for transfer to "Negro schools" were considered "informal" transfers and could be submitted throughout the year without regard to the provisions of the plan (R. 94–96). The court of appeals, in its opinion on the petition for rehearing in 1963, directed that the plan be applied to all transfers, whether formal or informal (R. 258).

transfer applications and 129 Negroes and one white actually submitted them (R. 65).[9]

The Negro students were subjected to various tests and interviews and, finally, ten Negro students[10] were selected to enter four formerly all-white high schools (R. 68).[11] All the other students were assigned to the schools which they had formerly attended (R. 62–63).

B. THE MOTION TO MODIFY THE PLAN

On April 30, 1962, petitioners filed a motion for further relief (R. 53). They objected that the students seeking transfer in 1961 were subjected to tests not applied to white students attending the white schools and that respondents were continuing a dual school system based on race in the grades which were

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[9] There are approximately 100,000 school children in Atlanta, about 45 percent of whom are Negroes (R. 59). As of 1961, there were 113 elementary schools, grades one through seven, and 22 high schools, grades eight through twelve (R. 231). Forty-one of the elementary schools were all-Negro while seventy-two were all-white (R. 231). Five of the high schools were all-Negro and seventeen all-white (R. 231).

[10] The basis for selecting the ten were "their reasons for wanting to transfer, their achievement in relation to the norm for the school to which they were requesting a transfer, and their proximity to the school" (R. 68; cf. R. 97). In applying the second factor, the School Board required that a transferee score a grade on certain tests that was at least equal to the average test score of the class to which transfer was requested (R. 232).

[11] One of the 130 students who sought transfer was a white student who requested to move from Northside High School (white) to Dykes High School (white) because Northside had been designated as a school to which Negroes would be admitted. This student's application was denied. See *Stone* v. *Members of the Board of Education of Atlanta*, 309 F. 2d 638 (C.A. 5) (R. 66, 231).

nominally desegregated under the plan (R. 55–56). Consequently, petitioners claimed, the plan had maintained, not ended, segregation (R. 56), and the district court was requested to afford the following relief (R. 57):

> (1) enter an order enjoining defendants from continuing to maintain and operate a segregated biracial school system in the City of Atlanta, specifically enjoining defendants from maintaining and operating "white" and "Negro" schools, and from assigning pupils to schools on the basis of race, and from assigning teachers to schools on the basis of race, and from designating and constructing "Negro" and "white" schools, and from maintaining a dual scheme or pattern of school zone lines based on race, and from supporting, approving, or sanctioning extracurricula school activities limited to one race or the other, and from continuing to make any other distinctions in the operation of the public school system of the City of Atlanta which are based wholly on race and color;
>
> (2) in the alternative, plaintiffs pray that this court require defendants to come forward with a complete plan for the reorganization of the entire biracial school system of Atlanta, Georgia, into a unitary non-racial system, which plan shall include a new plan for the assignment of pupils on a non-racial basis and a plan for the assignment of teachers on a non-racial basis, for the construction of schools on a non-racial basis, for the drawing of school zone lines on a non-racial basis, for reorganization of extracurricula school activities on a non-

> racial basis, and for the elimination of any other discriminations in the operation of the schools of Atlanta, Georgia, based on race and color.

Respondents opposed petitioners' motion for further relief and denied "that they have 'assigned' children to particular schools either on the base of race, color or otherwise, the fact being that the placement plan previously approved by this Court contemplated and provided that students in the Atlanta School System should continue to attend the schools which they were already attending, except that said plan provided that in the 11th and 12th grades students might apply for transfer * * *" (R. 79). Respondents concluded that petitioners were attacking "the plan of desegregation approved by this Court, which * * * [has] now become final and binding * * *" (R. 81).

1. THE PROPOSED PLAN

On July 20, 1962, petitioners filed a new desegregation plan (R. 82–83). It provided for desegregation of the five high school grades—the eighth through twelfth—in September 1963, the fourth through seventh grades in September 1964, and the remaining three grades in September 1965 (R. 82). Under the plan, all school zone lines were to be redrawn and students in the immediate vicinity of the schools were to be assigned without regard to race (R. 82). In addition, existing discrimination in the assignment or training of school personnel and in the organization of extracurricular activities was to be eliminated (R. 82–83; see also R. 239).

2. THE DISTRICT COURT HEARING

The following evidence was introduced in connection with petitioners' motion for further relief:

Dr. John Walter Letson, Superintendent of Schools in Atlanta, explained the procedure followed in making school assignments. He stated that, in September 1960, elementary and high school "[p]upils who had attended a school previously were assigned to the same school. Those who were beginning students were assigned to the same school attended by their neighbors" (R. 61; see also R. 62). Dr. Letson testified that Negro students moving from a Negro elementary school were assigned to a Negro high school and white students were similarly assigned to a white high school (R. 62–63, 99–100). The superintendent indicated that this same assignment method, except for students whose transfers were approved, was followed in 1961 after the plan went into effect (R. 63).

Dr. Letson explained that Atlanta uses school zones to equalize the attendance in the elementary and high schools where necessary (R. 61–62, 98). Where they exist, separate zones are drawn for Negro and white schools, so that when housing is racially mixed, the zones overlap (R. 61–62, 98). The same zones continued to exist, with only slight variations, after the desegregation plan was adopted (R. 61–62). While Dr. Letson testified that the zones were not rigid and were not indicated on an "official" map, he admitted that, except where transfers are permitted, the separate zones prevented Negroes from attending white schools (R. 77, 98).

Dr. Letson conceded that teacher assignments continued to be based on race (R. 72–73).[12] One of Atlanta's five area superintendents is a Negro, but there are no white schools under his jurisdiction (R. 72).

Transfer applications for the school year beginning September 1962 were received by the School Board between May 1 and May 15, 1962—while petitioners' motion for further relief was pending in the district court. Dr. Leston testified that approximately 300 applications for transfer to the tenth, eleventh and twelfth grades had been received and that, unlike in 1961, special tests were not administered to these students (R. 70, 105–106). However, a student applying for transfer was still expected to attain the average score for the class in the school to which he desired to transfer, on tests that were administered throughout the Atlanta school system (R. 70). Dr. Letson also explained that proximity of the school would be considered and that interviews would continue to be conducted (R. 70–71). Of the approximately 300 Negro students who applied for transfers in 1962, forty-four requests were granted (R. 94).

The district court found that Atlanta was not operating a dual school system based on race in the grades which were, according to the plan, desegregated (R. 158). It concluded that, since the original plan had been administered in good faith, there was no reason

[12] The application form for certification as a teacher in Atlanta requires that the applicant indicate his or her race (R. 92).

for modifying it (R. 159–160). Accordingly, the motion for further relief was denied.

3. THE DECISION BELOW

The court of appeals, Judge Rives dissenting, affirmed (R. 229, 245). Like the district court, it also postponed consideration of petitioners' contention that Atlanta was unconstitutionally assigning teachers and other personnel on the basis of race (R. 157, 244).

On petitioners' request for a rehearing *en banc* (R. 255), the court (acting through the same panel) denied the petition but, at the same time, ordered that certain "deficiencies" in the Atlanta plan (which were noted in its original opinion) be eliminated for the 1963–1964 school term (R. 258). The "deficiencies" related to the application of different criteria to Negro and white students seeking transfers. The court concluded that respondents could not continue to require that Negro students seeking transfer to a formerly all-white school be subjected to a "personality interview" and scholastic ability and achievement tests, unless similar requirements were imposed on white students who desired to transfer to the same school (R. 258–259). Accordingly, the only criterion now applied by respondents in considering an application for transfer is proximity to the school to which transfer is requested (Br. in Opp. 10, 27–28). The new standard, applied in the current school year, has resulted in the approval of 119 of 191 requests for transfer by Negro students in 1963 (*id.* at 28).

723-286—64——3

ARGUMENT

INTRODUCTION AND SUMMARY

1. When *Brown* v. *Board of Education*, 347 U.S. 483, was decided in 1954, the Court noted that, because the cases involved were class actions, "because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity" (347 U.S. at 495). Accordingly, the Court postponed its decision on the relief to be granted until after further argument on certain specified questions, notably: "[M]ay this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?" (347 U.S. at 496, n. 13).[13]

A year later, the question propounded by the Court was answered affirmatively. *Brown* v. *Board of Education*, 349 U.S. 294. The Court again acknowledged that good faith compliance with the fundamental rights declared in the first *Brown* case "may re-

[13] Prior to *Brown*, it had become well established that the constitutional right of Negroes to be free from discrimination on account of their race is a present right, entitled to immediate enforcement. This principle prevailed in the field of higher education, *Sipuel* v. *Board of Regents*, 332 U.S. 631; *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637; in voting, *Smith* v. *Allwright*, 321 U.S. 649; in interstate travel, *Henderson* v. *United States*, 339 U.S. 816; in property ownership, *Shelley* v. *Kraemer*, 334 U.S. 1; in employment, *Railway Mail Assn.* v. *Corsi*, 326 U.S. 88; and in jury service, *Ex parte Virginia*, 100 U.S. 339.

quire solution of varied local school problems" and might in some situations "call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision" (349 U.S. at 299–300). Accordingly, the Court did not require immediate and full implementation of its decision but permitted the transition to a racially non-discriminatory school system to proceed "with all deliberate speed" (Id. at 301).

In allowing a period of transition, the Court made clear, however, that certain basic ground rules would have to be observed. First, it was necessary that there be "a prompt and reasonable start toward full compliance." Second, "[o]nce such a start has been made"—and by implication, not before—additional time may be granted to carry out desegregation in an effective manned. Third, "[t]he burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date" (349 U.S. at 300). Finally, after setting out certain narrowly defined problems related to school administration that might justify delay,[14] the Court stressed that "it

[14] The Court noted that the implementation of its decision on the merits might "call for the elimination of a variety of obstacles in making the transition to [desegregated] school systems" (349 U.S. at 300) and set forth the considerations it had in mind (349 U.S. at 300–301): "problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact

should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them" (*Id.* at 300).

Three years later, in *Cooper v. Aaron*, 358 U.S. 1, 7 the Court elaborated the meaning of *Brown:*

> Of course, in many locations, obedience to the duty of desegregation would require the immediate general admission of Negro children, otherwise qualified as students for their appropriate classes, at particular schools. On the other hand, a District Court, after analysis of the relevant factors (which, of course, excludes hostility to racial desegregation), might conclude that justification existed for not requiring the present nonsegregated admission of all qualified Negro children. In such circumstances, however, the courts should scrutinize the program of the school authorities to make sure that they had developed arrangements pointed toward the earliest practicable completion of desegregation, and had taken appropriate steps to put their program into effective operation. It was made plain that delay in any guise in order to deny the constitutional rights of Negro children could not be countenanced, and that only a prompt start, diligently and earnestly pursued, to eliminate racial segregation from the public schools could constitute good faith compliance. State authorities were thus duty bound to devote every effort toward

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units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulation which may be necessary in solving the foregoing problems."

> initiating desegregation and bringing about the elimination of racial discrimination in the public school system.

Following *Cooper* v. *Aaron,* there was a considerable period during which the implementation and interpretation of the *Brown* decisions was left to the lower federal courts. But last year, in two opinions, the Court again directed its attention to the scope of the school desegregation decisions.

In *Watson* v. *City of Memphis,* 373 U.S. 526, 529–530, the Court used this pertinent language:

> * * * the second *Brown* decision, * * * which contemplated the possible need of some limited delay in effecting total desegregation of public schools, must be considered * * * in light of the significant fact that the governing constitutional principles no longer bear the imprint of newly enunciated doctrine * * * [W]e cannot ignore the passage of a substantial period of time since the original declaration of the manifest unconstitutionality of racial practices such as are here challenged, the repeated and numerous decisions giving notice of such illegality, and the many intervening opportunities heretofore available to attain the equality of treatment which the Fourteenth Amendment commands the States to achieve. These factors must inevitably and substantially temper the present import of such broad policy considerations as may have underlain, even in part, the form of the decree ultimately framed in the *Brown* case. Given the extended time which has elapsed, it is far from clear that the mandate of the second *Brown* decision requiring

> that desegregation proceed with "all deliberate speed" would today be fully satisfied by types of plans or programs for desegregation of public educational facilities which eight years ago might have been deemed sufficient. *Brown* never contemplated that the concept of "deliberate speed" would countenance indefinite delay in elimination of racial barriers in schools * * *.

And in *Goss* v. *Board of Education of Knoxville, Tennessee*, 373 U.S. 683, 689, the Court indicated that the expressions "good faith compliance at the earliest practicable date" and "all deliberate speed" cannot be given the same meaning today as at the time of the *Brown* decision. The Court stated (*ibid.*):

> Now, however, eight years after this decree was rendered and over nine years after the first *Brown* decision, the context in which we must interpret and apply this language to plans of desegregation has been significantly altered.

Ten years have now elapsed since the first *Brown* decision. In the intervening period, the aim in many places has been to delay rather than to desegregate. The concept of speed has frequently been subordinated to that of deliberation.[13] Among the methods which have been devised to assure that the process of desegregation be well braked are the two which are at issue in this case—the use of a grade-a-year plan and the continued assignment of students to

[13] In the eleven southern states, only 1.06% of the Negro children attend school with white students. Considering these eleven states, the six border states, and the District of Columbia together, the figure is 9.2%. *Southern School News*, December 1963, p. 1, cols. 1–5.

schools on the basis of race with the burden on the Negro child to seek a transfer if he desires a desegregated education.

2. It is against this background that the Atlanta plan, approved by the courts below, must be judged. In our view, there was scant justification for a twelve year plan in 1960, five years after this Court had enjoined school authorities to eliminate segregation "with all deliberate speed." But, whatever may be said in support of the original approval, it is now patent that administrative difficulties do not stand in the way of accelerating the grade-a-year pace of desegregation. We therefore conclude (Point I) that petitioners were plainly entitled to the moderate revision they proposed, which would achieve desegregation of all grades in 1965.

But undue delay is not the only flaw of the Atlanta plan. Indeed, perhaps more serious is the failure of school authorities to desegregate effectively even those grades reached by the plan. The actual experience in the nominally desegregated high school classes is accurately described as "tokenism." It results from the perpetuation of a dual school system, in which pupils, however "informally," are originally assigned on the basis of race. As we show (Point II), this vice alone condemns the plan in suit. Nor can it be cured by a liberal transfer policy—much less the discriminatory option plan still applied in Atlanta. Here, also, we support petitioners' prayer for a revised plan which will eliminate the residual discrimination in the nominally desegregated grades.

Finally (Point III), we join petitioners in urging the desegregation of school personnel. That step, it seems to us, is essential to the achievement of a truly non-discriminatory school system.

I

THE ATLANTA GRADE-A-YEAR PLAN DOES NOT ACHIEVE DESEGREGATION WITH ALL DELIBERATE SPEED

The Atlanta plan provides for the desegregation of the city's schools at the rate of one grade each year, starting with the twelfth grade and ending with the first. The plan was first put into operation in 1961, at which time the eleventh and twelfth grades were "desegregated." Nominal desegregation of all grades of the school system will not be achieved until 1971.

There was a time, perhaps, when progress at the rate of one grade each year could be reasonably viewed as necessary delay. Immediately after *Brown*, legitimate obstacles to a swift change-over might have seemed insuperable, and, for the first few years, that slow pace may have been justified. But, since then, ample notice and the opportunity for actual experience have foreclosed the claim that "administrative difficulties" are so great, or so imponderable, as to require deliberateness of that order. The plain fact is that everyone has long since known *how* to proceed without confusion or chaos, and that, except for deferring to hostility, there has been, for some years, no practical impediment to a much speedier transition.

It follows, in our view, that the pace of desegregation must be accelerated. Indeed, that seems to be the teaching of *Goss* and *Watson*.[16] And that is true largely without regard to the date on which actual desegregation was first initiated, for it can hardly be supposed that those school boards which delayed longest in recognizing the rights of Negro students should have more time to accommodate themselves to the constitutional mandate than those which, in good faith, made a prompt start. So saying, however, we do not discount the importance of looking to local conditions; nor do we suggest that the peculiar history of desegregation in each community is irrelevant. We stress only that a late start does not justify moving forward at the inordinately slow pace of one grade per year.

In this context, we examine the Atlanta plan. In Atlanta, clearly, there is no present obstacle to acceleration. A late-starter, the Atlanta School Board has enjoyed three years of actual experience in which to make a leisurely accommodation. The time is past due for more emphasis on "speed" and less on "deliberation."

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[16] See, also, *Davis* v. *Board of School Commissioners of Mobile County, Alabama*, 318 F. 2d 63, 64 (C.A. 5) ("* * * the amount of time available for the transition from segregated to desegregated schools becomes more sharply limited with the passage of years since the first and second *Brown* decisions"); *Jackson* v. *School Board of City of Lynchburg, Virginia*, 321 F. 2d 230 (C.A. 4); *Goss* v. *Board of Education of City of Knoxville*, 301 F. 2d 164 (C.A. 6), reversed on other grounds, 373 U.S. 683; *Evans* v. *Ennis*, 281 F. 2d 385 (C.A. 3); *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491, 500, 501–502 (C.A. 5).

A. CIRCUMSTANCES SUGGESTING ACCELERATION

The lapse of ten years since the declaration of a present constitutional right alone suggests a need for acceleration in the rate of desegregation. But, in this case, there are additional reasons for stepping up the pace.

1. Atlanta did not make "a prompt and reasonable start toward full compliance." For nearly two and a half years following the second *Brown* decision respondents refused to act on petitions by Negro parents requesting school desegregation. In 1958, this suit was filed, but another year and a half elapsed before the case came on for hearing. Respondents then argued that the racial "separation" in the Atlanta schools resulted from the voluntary choice of the community. The district court ultimately found that "racial discrimination existed in the custom and practice of the operation of the Atlanta Public Schools" and ordered respondents to present a plan of desegregation by December 1, 1959 (R. 162). Even then, they waited until the last day of the deadline imposed by the district court to present a desegregation plan. The plan submitted, though scheduled to become effective on September 1, 1960, was expressly made contingent upon State legislative action. The district court, improperly we think,[17] accepted the condition, and the failure of the legislature to act further delayed commencement of the plan until September 1961.

[17] Respondents' duty to obey the Fourteenth Amendment was not dependent in any way upon the concurrence of the State legislature. The Supremacy Clause (Art. VI) of the United States Constitution makes this clear.

In short, the Atlanta school authorities effectively delayed the beginning of desegregation for six years. The delay afforded ample opportunity to prepare for the period of transition. Those years cannot be discounted; they must be added to the three years of actual experience under the desegregation plan. Against this background, it is difficult to understand the contention that, even now, desegregation cannot proceed at a swifter pace than one grade each year.

2. Another circumstance militating against a continuation of the present pace is the downward progression established by the plan. As we have noted, the Atlanta pattern for gradual desegregation begins with the twelfth grade, moving downward one grade a year. It seems clear that such a plan will achieve desegregation more slowly than one that begins at the bottom of the educational system—at least where the whole burden of progress is placed on transfer options.

The reasons are plain. The first-grader, white or Negro, being untutored in the tradition of educational segregation, is more adaptable than the high-school senior who has known nothing else. Predictably, only a few students will seek to make an abrupt change from the school environment and associates they have known for ten or eleven years. Moreover, one of the recognized effects of a segregated education is that Negro students in the upper grades are less prepared to compete in an integrated school system, particu-

larly when, as in Atlanta, the Negro school system is both separate and unequal (R. 101).[18]

The effective elimination of the dual school system is far more likely when the natural progression from the bottom up is followed. And, of course, a greater number of students are affected in the first years when desegregation begins at the elementary rather than the high school level.[19]

3. Perhaps the most compelling reason for accelerating the pace of desegregation lies in the experience under the present plan during the last three years. The results are eloquently told in the small numbers of Negro students who have attended desegregated classes for a year or two: 10 in 1961, 40 in 1962, 119 in 1963 (Br. in Opp. 28). We later explore the cause of this "tokenism" (see Point II, *infra*), but it is evident that failure to achieve effective desegregation even in the grades reached by the plan suggests speeding up the pace in the hope that real progress may result when the cycle is complete.

B. ABSENCE OF JUSTIFICATION FOR FURTHER DELAY

1. When the district court approved the Atlanta plan, it retained jurisdiction of the case "for the purpose of entering such further orders or granting such further relief as may be necessary to bring about com-

[18] See *Monroe* v. *Board of Commissioners of City of Jackson, Tennessee*, 221 F. Supp. 968 (W.D. Tenn.) where the court considers the advantages of commencing school desegregation at the lowest grades.

[19] Indeed, it appears this was one reason the Atlanta school authorities chose to proceed from the top down. See note 22, p. 26, *infra*.

pliance with this decree" (R. 10). Petitioners did not appeal.[20] But it soon became clear that respondents intended to postpone full compliance as long as possible. The first year, 1961, only 10 of the 135 Negro students who applied for transfers were granted permission to enter formerly all-white high schools. The students applying for transfer, moreover, were subjected to a battery of tests and requirements that had to be met only by those seeking their constitutional right. It was in the light of this experience that petitioners returned to the district court for further relief, including an acceleration of the plan of desegregation.[21]

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[20] Petitioners' failure to appeal from the order of the district court approving a grade-a-year plan cannot bar a subsequent motion to accelerate the plan. The second *Brown* decision contemplated that the district courts would retain jurisdiction during the period of transition, 349 U.S. at 301. As a plan of desegregation progresses, it may become clear that more or less time is needed. Courts of appeal have recognized this continuing jurisdiction of district courts to accelerate plans of desegregation. See *Kelley* v. *Board of Education of Nashville*, 270 F. 2d 209 (C.A. 6); *Aaron* v. *Cooper*, 243 F. 2d 361 (C.A. 8); *Boson* v. *Rippy*, 285 F. 2d 43 (C.A. 5). Here the petitioners sought to test the reality of the alleged administrative problems that had been advanced to justify deferring desegregation. After observing the plan in operation, petitioners became convinced that greater speed was feasible and returned to the district court for additional orders. As Judge Rives stated (R. 245), petitioners "should not be faulted in seeking additional relief because of their willingness, for a period of two years, to permit the Atlanta plan to be tested out without appealing to this Court for any faster relief."

[21] Petitioner asked that the eighth through twelfth grade be desegregated in September 1963, the fourth through seventh grades in September 1964, and the remaining three grades in September 1965.

Acceleration was clearly appropriate. Respondents never demonstrated that this slow a pace was essential in the first place [22] or that—if it was—acceleration has not since become feasible.

2. The district court and the court of appeals suggested that petitioners had the burden of showing that the original plan was no longer adequate and that they had failed to meet this burden (R. 159.

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[22] When first approving the plan, the district court summarized respondents' reasons for delay as follows (R. 19):

"As introductory to the Plan itself the resolution adopting the same states certain pertinent facts confronting the Atlanta Board of Education, and these facts not being refuted by the plaintiffs are taken to be true. Among other things a recital is made that the Board is faced with the task of educating 116,000 pupils, of which approximately forty per cent, or some 46,000 are negroes; that there is at this time a rapid influx of children of school age in the City, that these children vary in achievement and ability: that there is at present a shortage of 580 classrooms, many classes are held in churches and other buildings, and many have double sessions. Other problems confront the Board brought about by slum clearances and changes in residential patterns in various communities.

"The foregoing facts are stated by the Court to illustrate the problems confronting the defendant Board of Education. The Plan abolishes segregation beginning at the twelfth grade, and each year takes in a lower grade until all grades in all schools are included, and should all or a large part of 46,400 negro children apply for assignment at one time, it would of course put an intolerable burden upon the School Board to process their applications and make readjustments in all classes and in all schools. That fact must have been in the mind of the defendants when they proposed commencing the Plan with only the twelfth grade.

"Also, it is recognized that where such a Plan begins with the first grade and extends to the higher grades there is a greater problem as to adequate housing and a greater degree of disruption in initiating the Plan."

243–244). That approach, it seems to us, ignores the nature of the right involved—a "present" right, as *Watson* emphasizes.[23] With the passage of each additional year of segregated schooling, the denial of the equal protection of the laws is perpetuated and emphasized anew. In the most recent proceeding petitioners merely requested that their rights be afforded "here and now" on a more widespread basis. Their renewed demand—for the implementation of present constitutional rights—may well have been sufficient to require those who would withold those rights to justify their actions.

But, in any event, petitioners met any burden that might legitimately be imposed upon them. In their motion for further relief, they complained of the token number of students who had been permitted to breach the barriers and objected to the imposition of special tests on those seeking to transfer (R. 55). Petitioners alleged that the "plan of desegregation proposed by defendants in this case and approved by this Court has not been used by defendants to bring

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[23] In *Watson*, the Court said (373 U.S. at 530–533): "* * * it must be recognized that even the delay countenanced by *Brown* was a necessary, albeit significant, adaptation of the usual principle that any deprivation of constitutional rights calls for prompt rectification. The rights here asserted are, like all such rights, *present* rights; they are not merely hopes to some *future* enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled. The second *Brown* decision is but a narrowly drawn, and carefully limited, qualification upon usual precepts of constitutional adjudication and is not to be unnecessarily expanded in application."

about desegregation in the public schools of Atlanta, but, on the contrary, has been used to maintain segregation" (R. 56), and facts were set forth to substantiate this contention. It was shown that the Atlanta school authorities had not made a "prompt and reasonable start toward full compliance." The evidence adduced at the hearing revealed that Atlanta's desegregation plan was not what it appeared to be on its face; it demonstrated the token nature of the plan in its application. It only remained to note the passage of time, which, at once, made the petitioners' claim of right more urgent and suggested that full opportunity had been accorded to the respondents to work out the necessary accommodation.

In that posture of the case, the burden was upon the respondents to rebut the demonstrated need for extensive changes. It is plain they failed to carry that burden.

II

DESEGREGATION IS NOT ACHIEVED BY THE MAINTENANCE OF A DUAL SCHOOL SYSTEM WITH A TRANSFER OPTION

A. THE DUAL SCHOOL SYSTEM

Atlanta continues to maintain a separate system of schools for Negroes and for whites—both in the grades covered by the desegregation plan and those not yet reached. To be sure, a very few schools, formerly all-white, now admit a handful of Negro transferees. But otherwise all schools, whether nominally affected by the plan or not, are reserved exclusively for one

race or the other, and, except as transfers are approved, all children must attend a school of their race. No disclaimer, no contrary "finding," can change these basic facts. The controversy on this point, it seems, is little more than a quibble over labels.

Thus, it may be true that schools are no longer administratively characterized "White" or "Negro," but that surely does not affect the reality. Again, it does not matter that, instead of "official" attendance lines (R. 98) drawn by the "Board of Education" itself (R. 61–62) and indicated on "maps" located in the "central office" (R. 77), the dual school system is reflected on "rough sketch[es]" in the office of the "area superintendent" (R. 77), who, with the help of "local school officials," draws the lines (R. 61–62). Nor is it significant that new students find their school by following their "brothers and sisters" (R. 61), their "friends" (R. 98) or their "neighbors" (R. 60, 61, 62), rather than by being assigned directly from the "superintendent's office" (R. 98). The existence of a dual school system does not depend on lines, or maps, or assignments—much less by whom they are made. The only relevant question is whether children are initially restricted to schools of their own race, subject only to a transfer which must be applied for and which is granted on satisfying stated conditions.

That is the situation here. It is conceded that for the elementary grades (unaffected by the desegregation plan), two sets of schools are maintained, one for each race, without the slightest attenuation (R. 61, 62, 98). Apparently, no rigid attendance lines are drawn, so that some students have a choice of schools;

but the Atlanta school superintendent was clear that the rules were not so relaxed as to permit a Negro child to attend a "white" elementary school (R. 98, 105). Indeed, as of 1962, there had been "no change in the elementary situation" existing in 1960 (R. 61), when Atlanta admittedly had "a segregated school system" (R. 98). And, in June, 1963, the court below (albeit in a footnote that seems to contradict the text of the opinion), expressly noted that "[t]he dual system undoubtedly continues in the grades not yet reached by the plan" (R. 240. See, also, dissenting opinion of Judge Rives, R. 250–251). Nor is there any claim that the dual system for the elementary grades was altered in any respect during the 1963–1964 school year.

The continuance of the dual system in the "desegregated" high school grades is likewise clear. According to the school superintendent, "there has been no attempt on the part of the school system as yet to draw rigid attendance areas that would be applied irrespective of race to the pupils living there" (R. 99). Students progressing from elementary school to high school attend the high school which has "traditionally" received students from their particular school. As of old, the Negro elementary schools feed into the Negro high schools and the white elementary schools feed into the white high schools (R. 62–63, 99–100). The obvious consequence, as the court below recognized, is the perpetuation of the dual school system, at least "in residual form" (R. 240, n. 4. See, also, dissenting opinion of Judge Rives, R. 251, n. 5). In short, even for the desegregated grades, assignments

are still made "[t]he same way, except that [high school students] are subject to transfer upon request" (R. 63). There is no suggestion that, to date, a single Negro has been permitted to attend a desegregated class except after "transferring out" of an all-Negro class upon formal application, duly approved.

To be sure, there is some contention that the decision below requires abandonment of the dual system with respect to high schools next September when grades 8 through 12 will be subject to the desegregation plan. But, at best, that is true only for new students, or those then entering the eighth grade (see R. 241–242). So long as all other high school students are re-assigned to the same school—presumably another four years—the dual system will persist. Indeed, the provision for continued transfers, conditioned on proximity to the new school, assumes that some high school students will receive a desegregated education at the school nearest their home only after having been first assigned to a more distant school and applying for the change.

Moreover, it is far from clear that the desegregation plan, as construed by the court of appeals, will *ever* eliminate the dual school system. For, contrary to the court's apparent assumption (R. 241–242), respondents do not propose, this fall, to "assign" all eighth-graders to the school nearest their home. On the contrary, they oppose rigid school zones (Br. in Opp. 11, 20) and explicitly say they "do not think the Fifth Circuit has demanded the marking off of school zones as rings of iron around each school" (*id.* at 10). The plain inference is that the old

"feeder" system will continue—white students from all-white elementary schools going to the "traditional" white high school and Negro students going from the all-Negro elementary schools to the "traditional" Negro high school—except only that every child shall have the option of attending, instead, the school nearest his home. But attendance at the neighborhood school will not result from a compulsory assignment: it is a mere optional "right (*id.* at 11, 12, 18), presumably accorded only upon request. Labels aside, the new privilege to be initially "assigned" to the school most proximate to the student's home seems to be nothing more than the familiar right of transfer. The upshot, it seems fair to predict, will be the perpetuation of the two-school system, tempered only by the boldness of Negroes who wish to demand entrance to the "white" school, if it happens to be nearer their home.

The perpetuation of a dual school system in which pupils are initially assigned on the basis of race alone condemns the Atlanta desegregation plan. The Fourth Circuit so held in *Jones* v. *School Board of City of Alexandria, Virginia,* 278 F. 2d 72, 76:

> Obviously the maintenance of a dual system of attendance areas based on race offends the constitutional rights of the plaintiffs and others similarly situated and cannot be tolerated. * * * [T]he enforced maintenance of such a dual school system is here specifically condemned.

Quoting *Jones* with approval, the Sixth Circuit has adopted the same rule. In *Northcross* v. *Board of*

Education of the City of Memphis, 302 F. 2d 818, 822–823, that court said:

> Since [the *Brown* case] there cannot be "Negro" schools and "white" schools. There can now be only schools, requirements for admission to which must be on an equal basis without regard to race.
>
> Minimal requirements for nonracial schools are geographic zoning, according to the capacity and facilities of the buildings and admission to a school according to residence as a matter of right. * * *

And the Fifth Circuit itself has so held. In *Augustus v. Board of Public Instruction of Escambia County, Florida*, 306 F. 2d 862, 869, the court stated:

> There cannot be full compliance with the Supreme Court's requirements to desegregate until all dual school districts based on race are eliminated * * *. The plan should * * * provide for the elimination of all dual school districts on racial lines at the earliest practicable time.[24]

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[24] The court below, in attempting to distinguish this decision, noted (R. 240): "We do not yet know what method of eliminating the dual system is to be used in the *Escambia County* case." However, a method actually was approved by the District Court for the Northern District of Florida nearly seven months before the court of appeals decision. The order of the district court modifying the original plan (and conforming to the decision of the court of appeals) provided, in part (8 R.R.L.R. 58, 59): "1. New pupils entering the first grade or coming into the County for the first time shall be admitted to appropriate school without discrimination as to race or color. 2. Dual school districts on racial lines shall be eliminated in accordance with the following: a. With reference to the first two grades to be effective for the 1963

So, also, in *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491, the same court had required the gradual elimination of the dual school system.

In this light, it is not surprising that the majority opinion below is at pains to question the existence of a dual system, and that Judge Rives, dissenting, concluded that his court was now "stepp[ing] backward from the position it [had] previously taken after long and mature deliberation" (R. 253).

B. THE TRANSFER OPTION

What we have already said suggests that even the most generous transfer provision cannot save a plan under which students are initially assigned by race and may escape from the segregated system only by making formal application. As Judge Wright said in *Bush* (204 F. Supp. 568, 570–571), in language quoted approvingly by the Fifth Circuit (308 F. 2d at 498): "To assign children to a segregated school system and then require them to pass muster under a school placement law is discrimination in its rawest form." The vice is clear: "Negro children cannot be required to apply for that to which they are entitled as a matter of right." *Northcross* v. *Board of Education of the City of Memphis, supra*, 302 F. 2d at 823.

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fall term. b. The School Board shall submit for the consideration of this Court proposed map showing school zone lines to carry out the provisions of paragraph 2a above on or before April 10, 1963. c. With reference to the third grade, such dual zone lines shall be eliminated to be effective for the 1964 fall term, and thereafter such elimination shall be effective as to at least one successive additional grade each successive school year."

But, in any event, the Atlanta transfer option system has other inherent defects. It is true—as respondents stress—that transfers are now rather freely permitted in the desegregated grades. Initially, Negro students seeking transfer to "white schools" were subjected to patently discriminatory requirements. Today, these have, in the main, been eliminated. See *supra*, p. 13. At the present time, subject to certain limited exceptions,[25] a student in one of the desegrated grades will be granted a transfer if the school which he wishes to attend is the school closest to his home. Yet, despite this seeming simplicity, the plan remains discriminatory and is not calculated to achieve desegregation.

White students continue to attend schools "traditionally" attended by members of their race without regard to the availability of a Negro school closer to their homes. Similarly, a Negro child will attend a "Negro school" irrespective of its distance from his home. Negro children can escape these segregated assignments only by affirmatively going forward to seek redress by asking for transfers. But transfers are granted only if the Negro applicant happens to live closer to a "white school" than to the school he is presently attending; white children, on the other hand, are not restricted to their neighborhood schools. If they wish, they can avoid desegregated education merely by remaining at the schools historically desig-

[25] See Br. in Opp. 11, where respondents note that certain physical obstructions such as railroad tracks might preclude a child from attending the school nearest his home.

nated for members of their race—regardless of the distance between those schools and their homes.

Such a transfer plan, superimposed upon a dual school system, is calculated to perpetuate school segregation. It has had this effect in Atlanta. See p. 24, *supra*. Inevitably, when Negro students are required affirmatively to seek an escape from prevailing conditions, far less desegregation will occur than if all students were initially assigned to schools without regard to race. Indeed, the conclusion cannot be avoided that such plans are designed precisely for that purpose: to minimize the scope of desegregation.

C. EFFECT OF THE OVERALL PLAN

The vice of the Atlanta plan would seem to be sufficiently demonstrated in the actual results: Of some 12,000 Negro students in four nominally desegregated high school grades,[26] less than 150 are presently enjoying a desegregated education (Br. in Opp. 7). Plainly, that is no accident of geography. It only remains to deal with the half-spoken claim that the large-scale perpetuation of segregation in the grades affected by the plan of desegregation is "voluntary."

At the outset, it is clear that the duty of the school authorities to achieve desegregation is not discharged by permitting white students to attend schools that

[26] While no exact figure is available, respondents state there are presently "over 14,000 Negro children in the Atlanta high schools" (Br. in Opp. 18), which includes the 8th grade, to be "desegregated" this fall. A fair inference is that the remaining high school grades (9–12) include some 12,000 Negro students.

are not open to Negroes on the same basis. Indeed, *Goss* teaches that even a school board which has eliminated the dual system cannot, consistently with its constitutional obligation, grant "one-way tickets", good only, as a practical matter, when proceeding in the direction of segregation. Yet, that is a feature of the plan in suit: while they are given the option to attend their neighborhood school, which may or may not be a "Negro" school, white students, regardless of residence, are guaranteed admission to a "white" school, where Negroes are not admitted on the same basis, and where few, if any, actually will be enrolled. In short, the situation here is the same as in *Goss*, except only that in Atlanta effective desegregation is defeated by the easier expedient of permitting the white student to remain where he is originally assigned, while in Knoxville the same result was achieved by allowing him to transfer out.

Nor does the option given the Negro student correct the situation. As we have noted, he is originally assigned to an all-Negro school, from which his only means of escape is by affirmatively seeking transfer. This in itself is an unfair burden. But, what is more, the Negro student has no assurance of obtaining a desegregated education. Indeed, even if he lives in a "mixed" neighborhood, his chances are poor. For his transfer to a "white" school, even now, will be approved only if there is no "Negro" school nearer his residence, which, more often than not, will be the case.

Plainly, the Atlanta plan is not designed to achieve desegregation, even at the most deliberate pace. Instead of "devot[ing] every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system," as they were "duty bound" to do, *Cooper* v. *Aaron, supra,* 358 U.S. at 7, the school authorities have shifted the entire burden to the Negro students and their parents, putting obstacles in their path, while at the same time permitting the white students to avoid desegregation by merely staying put. The present plan does not respond to the constitutional mandate. Substantial revision is clearly necessary before it can qualify as a *bona fide* "plan of desegregation."

The obvious remedy is the establishment of a single school zone system which assigns every child reached by the desegregation plan to the school nearest his home. Since Atlanta eschews this easy solution,[27] another possible constitutional alternative would seem to lie in the original New Orleans plan: each child permitted to attend—without application, assignment or transfer—either the former white school nearest his home, or the former Negro school nearest his home, at his option. See *Bush* v. *Orleans Parish School Board,* 5 R.R.L.R. 378; *id.,* 204 F. Supp. 568, 569; *id.,* 308 F. 2d 491, 493.

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[27] Respondents say they "would * * * oppose the drawing of school zones by a Court or even the school authorities. Atlanta has never had a system of zones" (Br. in Opp. 11).

III

DESEGREGATION OF SCHOOL PERSONNEL IS NECESSARY TO ACHIEVE A NONDISCRIMINATORY SCHOOL SYSTEM

The lower courts declined to order respondents to take any steps to eliminate racial discrimination in the treatment of school personnel. We believe that compliance with *Brown* requires a school board to eliminate racial discrimination throughout its school system.

In the second *Brown* case, this Court enjoined the district courts to supervise the effectuation of "a racially nondiscriminatory *school system,*" 349 U.S. at 301 (emphasis added). In *Cooper* v. *Aaron,* 358 U.S. 1, 7, the Court again spoke of bringing about the "elimination of racial discrimination in the public *school system*" (emphasis added). Obviously, a public school system cannot be truly nondiscriminatory if the school board assigns school personnel on the basis of race. Full desegregation can never be achieved if certain schools continue to have all-Negro faculties while others have all-white faculties.[28]

[28] The district court here, by retaining jurisdiction of the question of personnel desegregation recognized that this was an aspect of achieving compliance with *Brown.* Other courts, too, have considered personnel desegregation to be an element of *Brown.* See *Augustus* v. *Board of Public Instruction of Escambia County, Florida, supra*; *Jackson* v. *School Board of City of Lynchburg, Virginia,* 321 F. 2d 230 (C.A. 4); *Board of Public Instruction of Duval County, Florida* v. *Braxton,* No. 20294 (C.A. 5, January 10, 1964). In *Braxton, supra,* the Court of Appeals for the Fifth Circuit had before it a district court order which

Schools will continue to be known as "white schools" or "Negro schools" depending on the racial composition of their faculties. It follows that the school authorities must take steps to eliminate segregation of personnel as well as pupils.

Here, the question of desegregation of school personnel was indefinitely postponed by the district court. In this, we believe, the court erred. At the least, the court should have required respondents to propose a plan for eliminating this form of segregation in the Atlanta schools. Just as a school board has the burden of justifying continued segregation of students it must also justify continued segregation of its personnel. The problems here do not appear serious and no justification has been offered to date.

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prohibited the assignment of teachers and other personnel on a racial basis and prohibited the financing and physical arrangement of schools on a racial basis. The court concluded that this type of relief was contemplated by *Brown* and was recognized as appropriate in *Augustus* and the instant case. The court said (slip opinion, p. 10):

"Where * * * the trial court, which has the first duty with respect to requiring action if none is taken initially by the Board of Education, considers that in order fully to implement the Supreme Court's decision it will be necessary to put an end to the assignment of teachers and other personnel by race to the schools within the Board's jurisdiction we think it can not conceivably be said that such an order goes beyond the permissible range of the trial court's choice of means to put an end to an operation of schools on a racially segregated basis."

CONCLUSION

We conclude that good faith compliance with the constitutional obligation to complete desegregation at the earliest practicable date requires a revision of the Atlanta plan so as to provide (1) an acceleration in the pace of desegregation which will achieve desegregation of all elementary and high school grades no later than September 1965; (2) an elimination of the dual racial school system in the grades reached by the plan; and (3) a reasonably prompt program for the desegregation of school personnel.

Accordingly, we submit that the judgment below should be reversed and the cause remanded to the district court with instructions to revise the desegregation plan in the manner indicated, or to require the school board itself to do so without delay.

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MARCH 1964

U. S. GOVERNMENT PRINTING OFFICE 1964

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 623

FRED S. CALHOUN, *et al.*,

Petitioners,

—v.—

A. C. LATIMER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS

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—v.—

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BRIEF FOR RESPONDENTS

Questions Presented

(a) Does a desegregation plan based on *Shuttlesworth* v. *Birmingham*, fairly applied, in which all criteria for transfer except proximity have subsequently been eliminated satisfy *Brown* v. *Board of Education*?

(b) The United States District Court for the Northern District of Georgia, Atlanta Division, and the United States Court of Appeals for the Fifth Circuit have held that a grade-a-year desegregation plan, effective at the date of this brief for four (4) grades, proceeds at such speed as to achieve desegregation "at the earliest practicable date." Should that decision be reversed when there has not been presented to the court below any showing of a change in circumstances since the adoption of the plan to justify an acceleration of the plan?

(c) May the United States districts courts and courts of appeal reserve questions of faculty and staff re-assignment for desegregation purposes until such time as a desegregation plan has made substantial progress in the desegregation of school children?

Statement

The history of this case has been fully outlined to this Court in the Petition for Certiorari, Brief in Opposition to the Petition for Certiorari, and briefs filed by the petitioners and by the United States. We will not, therefore, reiterate it at this time, but will comment merely upon certain significant aspects of that history.

The suit was filed in 1958 and in normal course resulted in a desegregation decree in 1959 and the submission of a desegregation plan. Because of widespread opposition to desegregation in the State of Georgia at that time there was on the statute books of the State legislation which would have required closing of the public school system of the City of Atlanta in the event of desegregation. A concerted campaign to change the sentiment in the State to permit desegregation of the Atlanta schools without disaster for public education in the City was undertaken by numerous citizens and organizations in Atlanta and environs, and in some cases outside the City. We are aware of the decision of this Court in *Cooper v. Aaron*, 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 19 (1958), and do not offer this public opposition as justifying defiance of the decisions of this Court, either at that time or now. We simply say that it was a fact of life with which the district judge had to deal at the time. As a result, he permited the inclusion in the desegregation plan submitted by the defendants

of a provision making the implementation of the plan contingent upon enactment of enabling legislation by the 1960 Georgia Legislature. When no such legislation was enacted, the Court withheld implementation of the desegregation decree until September, 1961. At that time desegregation was to commence no matter what consequences were to be visited upon Atlanta public education by the Georgia Legislature. To make up for the year's delay, the Court ordered that the grade-a-year plan be applied to two (2) grades in the first year of its operation.

Thus, desegregation of the Atlanta school system actually commenced in September of 1961. By that time, sufficient change in the sentiment of the people of the State had been brought about to enable the City of Atlanta to handle this difficult time in accordance with its traditional spirit of tolerance and moderation. While this Court has pointed out in *Watson v. Board of Education of the City of Memphis*, 373 U. S. 526, 10 L. Ed. 2d 529, 83 S. Ct. 1314 (1963), that a considerable period of time has elapsed since *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), it is nevertheless true that the Atlanta plan has been in operation only since 1961. This late start is not attributable to any actions of the respondents or any other officials of the City of Atlanta. We do not claim that this fact provides the City with a cloak of protection for unconstitutional action nor that it justifies delays not otherwise warranted. Per contra, the delays that have occurred did not result from recalcitrance or bad faith of these respondents and do not justify imputations of any such conduct to them. Insofar as the comments of Mr. Justice Goldberg, in *Watson*, are based

upon inferences of this nature, they would not be applicable here. The progress under the Atlanta plan has, in fact, been quite remarkable and it is proceeding at an accelerating pace.

The desegregation plan originally submitted by the respondents was modelled upon the Birmingham plan approved in *Shuttlesworth v. Birmingham Board of Education*, 358 U.S. 101, 3 L. Ed. 2d 145, 79 S. Ct. 221 (1958), affirming 162 F. Supp. 372. The plan originally involved the use of some eighteen (18) criteria to be applied in the consideration of applications for transfer from one school to another. An essential feature of the plan was that it was a transfer plan; that is, it involved an acceptance of school assignments as they then existed as a base, with desegregation to be accomplished by transfers on application. With respect to children entering high school, this feature of the plan is scheduled for discard by the respondents as a result of the opinion of Judge Bell below. Petitioners themselves have pointed out that the use of a transfer system to effect desegregation continues in use in the Fourth Circuit, provided only that transfers be freely given.[1]

It would seem to us that such a transfer system is constitutionally valid if this Court is not to repudiate *Shuttlesworth*. Moreover, this Court pointed out only last year in *Goss* v. *Board of Education of the City of Knoxville*, 373 U.S. 683, 10 L. Ed. 2d 632, 83 S. Ct. 1405 (1963):

> ". . . we note that if the transfer provisions were made available to all students regardless of their race and regardless as well of the racial composition

[1] See footnote 9 on page 11 of the Brief for Petitioners.

> of the school to which he requested transfer we would have an entirely different case. Pupils could then at their option (or that of their parents) choose, entirely free of any imposed racial considerations, to remain in the school of their zone or transfer to another."

The desegregation plan as filed and accepted by the District Court included numerous factors designed to assure that any person transferred from a segregated to a desegregated school would be able to achieve success in his new environment. To this end, personality interviews and special tests were used in evaluating applications for transfer. In the Court below Judge Bell pointed out (see footnote 2. in his opinion) that "such solicitude has rightly been condemned where applied only to Negroes." He also pointed out that "it would appear, where done in good faith, and there is no contrary contention here, to lend itself, at least in the early days of transition, to assuring the success of a plan." In the first year of desegregation the result of this caution by the respondents was that only ten (10) transfers were granted.

In the second year of the operation of the plan certain of the tests and interviews were abandoned by the respondents, without compulsion of court order, and a larger number of transfer applications were granted. It had been ascertained that special personality and intelligence tests served no useful educational purpose, and they were discarded.

By fall of 1963, the respondents felt that the solicitude above-mentioned was no longer necessary. At that time there were on file a good many applications for transfer that had been previously rejected. Each applicant was summoned by school officials and asked if

he still wished to have his application considered. If the applicant replied that he did, the request for transfer was granted upon one condition. That condition was that the applicant reside nearer the school to which he sought transfer than to the school he was then attending. *Every applicant who met this condition had his application granted.*[2]

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[2]The conferences at which this occurred were reported in a letter from a school official to one of counsel for respondents:

Atlanta Public Schools
Administration Building
224 Central Avenue, S.W.
Atlanta 3, Georgia

Administrative Offices

December 6, 1963

Mr. A. C. Latimer
1203 Healey Building
Atlanta, Georgia

Dear Mr. Latimer:

In response to your request for further information I am supplying answers to specific questions as follows:

1. Upon what basis and authorization were Negro transfers allowed in 1963?
   In June, 86 Negro pupils were authorized transfer on the basis of probability of succeeding academically and upon their proximity to the school requested. However, in August, 1963, the factor or criterion of "probability of academic success" was removed and all students desiring to continue their application were transferred provided they lived closer to the predominantly white school requested. This new position was approved by the Board of Education on August 20, upon the recommendation of the Superintendent.
2. What were some comparisons in terms of number of transfers requested, number of transfers approved, and percentage of transfers approved in 1961, 1962, and 1963?

	1961	*1962*	*1963*
Number returning applications	135	263	191
Number authorized to transfer	10	40	119
Percentage	07%	15%	62%

3. Of the number applying for transfer in 1961, 1962, and 1963, how many were denied admission who, in fact, lived closer to the white schools requested than to the Negro schools in which they were currently enrolled?

Scheduled for the fall of 1964 is the next step, ordered

	1961	*1962*	*1963*
Number applying	135	263	191
Number approved	10	40	119
Lived closer to present school	90	72	29
Lived closer to "white" school	35	151	43
Number denied living closer to "white" school	25	111	0*

*None denied who wished their application continued.

4. Are there instances or examples in which the Atlanta school system liberalized the Pupil Placement Plan or exceeded the tempo of desegregation prescribed by the plan, or otherwise demonstrated good faith in going beyond the minimum limits of the placement plan, in desegregation of the schools?

(a) At the outset only 3 of the 18 criteria were used because only 3 appeared to be practical and meaningful. In 1962, the only factors judged were "probability of academic success" and "proximity to the schools requested." In 1963, no factor was used except that of "proximity to the school requested."

(b) Students moving into the city requesting transfers to white schools on dates other than that specified by the pupil placement plan were allowed to enroll in predominantly white schools. (Example: Paula Sherwood moved here from New York and requested to enter West Fulton and the request was granted.)

White students requesting transfer to Negro schools were approved. (Example: Charles Jerome Coleman to Washington.)

(c) Occasionally students are allowed to accelerate from the 7th to the 9th grade when these students are exceptionally brilliant. (Example: Michael Fears, a Negro student, was allowed to skip the 8th and move directly from the 7th to the 9th grade at predominantly white Fulton High School.)

(d) About 14 students were enrolled at Smith-Hughes, previously all white, last February without having to file application as prescribed in the Pupil Placement Plan.

(e) In the fall of 1963 all Negro applicants, qualifying for admission on the same basis as white, were admitted to Smith-Hughes Vocational School. The number enrolling is 334 adult students.

I hope this information is what you requested.

Sincerely yours,

RUAL W. STEPHENS
Deputy Superintendent

RWS:eih

by the Circuit Court. At that time the transfer feature of the desegregation plan begins to vanish as elementary students move into the high schools nearest their homes without application. Of course there will remain a transfer provision authorizing applications for transfer on non-racial grounds. When the plan has reached the first grade it is to be assumed that initial assignments to the first grade will be made on a similarly acceptable basis. In the meantime it will also have passed from the higher grades.

Most cities that have adopted desegregation plans have provided for commencing with the first grade or kindergarten and working upward. The Atlanta plan started with the twelfth grade and is working its way down. There does not appear to be universal agreement as to which of these plans is better. While the first grade up method may minimize racial prejudice by accustoming children to a desegregated situation in their earliest years, the top down system has the effect of assuring that all school children in the system when the plan goes into effect shall have an opportunity for desegregated education during their years in school. That is, if the Atlanta plan remains in force in its present form, applying from the eighth through the twelfth grades in the fall of 1964, children now in the seventh grade will have five years of desegregated education, children now in the sixth grade will have six years of desegregated education, and so on. In this way there is not the possibility that a child will move along just ahead of desegregation as he might in a bottom up desegregation plan.[3]

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[3]The same point is made in Knowles, *School Desegregation*, 42 No. Car. L. Rev. 67, 72, n. 27. "If a grade-a-year plan started at

Other advantages of the Atlanta type desegregation plan were derived from the more extended extra-curricular activities available in upper grades. As Judge Bell pointed out below:

> "Negro students assigned to previously all white schools participated in both regular and extra-curricular activities, including honor banquets, clubs and other activities on the basis of free choice, and their parents attended Parent-Teacher Association meetings, athletic events, graduation programs and other school activities free of racial discrimination. School events to which the public is invited are not segregated, nor are meetings of professional committees." (R 234)

Thus there are important advantages to be derived from a top down desegregation plan. The brief of the United States pointed out that there are disadvantages, too. We realize that that is true, but no implication that all the advantages are on one side is justified.

The District Court, in the exercise of its discretion, chose to postpone the consideration of faculty desegregation until further progress had been made in desegregation of students. (R 157). Nevertheless, there has occurred some desegregation of faculty activities on the initiative of the respondents. (R 73).

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grade twelve and worked down, it would allow every Negro child in the system an opportunity, albeit limited, for some desegregated education. On the other hand, if a grade-a-year plan started with the first grade, no Negro child in grades two through twelve would ever experience a desegregated education."

ARGUMENT

1. *The Plan Will Achieve Complete Desegregation.*

We understand the effect of the *Brown* decision to be as follows: After the transition period has ended, every child attending public schools in any city in the United States shall be assigned to school on the same basis as every other child in that city, without regard to race. If neighborhood housing patterns are such that the result is that many schools are attended predominantly by one race rather than another, this is a constitutionally permissible result.

The brief of the United States (p. 36) makes much of the fact that only some 150 Negro students are presently attending formerly all-white schools, and states: "Plainly that is no accident of geography." Implicit in that sentence is the assumption that if it were an accident of geography it would be permissible.

At least in large part it *is* an accident of geography. The District Court, which sits in Atlanta and knows the facts, found that:

> "The above result, [a small number of Negroes in formerly all-white schools] however, where it pertains, is not necessarily brought about on account of racial discrimination, but on account of geography and residential patterns."[4]

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[4]R. 20. Further, the District Court and counsel for petitioners engaged in the following colloquy:

"Mrs. Motley: I think the nearness to the school is a pertinent consideration but I don't see that in this plan.

The Court: Well, there's nothing in there to negative that. Now would I not be compelled to take judicial cognizance of the fact that in Atlanta the—residentially speaking there are vast

In the light of this finding it is apparent that numerical comparisons like the one contained in the brief of the United States are actually meaningless and do not, standing alone, justify any inferences. The argument is glib, but it is not relevant.

Based on such numerical calculations which in turn are based on geography and upon the fact that the Atlanta plan has not come to full fruition, opposing counsel gratuitously assume that such plan will not result in complete desegregation; and worse, that it was not designed to do so in the first place.

To this we must respond.

As previously stated the Atlanta plan is based almost verbatim upon the Alabama plan considered in *Shuttlesworth v. Birmingham Board of Education*, 162 F.Supp. 372. It is significant, we think, that this is the only comprehensive plan of school desegregation which has ever been considered and held constitutional by this Court either "on its face" or otherwise. 358 U.S. 101.

Two Courts have held that the Atlanta plan is being fairly administered. Indeed, while the Motion for Further

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white areas and colored areas and that in those areas the students are predominantly white and colored? That's a fact, isn't it?
Mrs. Motley: Yes, sir.
The Court: Well then would it not follow if you say that they shall stay in the schools in which they now are for the great part, you would still have primarily white in some and colored in others, isn't that true?
Mrs. Motley: Yes, if the children are assigned on the basis of nearness to schools, you would still have many schools which are primarily white and which are primarily Negro.
The Court: Now in spite of all that you say that they should not be left prima facie where they are and then pertinent changes made. I don't quite understand that.
Mrs. Motley: No, the objection which I have relates to the designation of certain schools as Negro and white...." (R 212).

Relief that gave rise, ultimately, to the Writ of Certiorari purported to challenge the administration of the plan, its real thrust was an attack upon the plan as a whole and on its face. It must have been the thought of petitioners that *Shuttlesworth* precluded an undisguised attack upon the plan as a whole. Even so, that is what the Motion for Further Relief was.

This fact is apparent from a consideration of the proceedings below, and the nature of the further relief sought. Though it was said that the attack was aimed at discriminatory application of the plan, no effort was made by petitioners to show even one instance in support of the charge. Petitioners asserted that they need not take cases of discrimination individually, and it may be that they are right. On the other hand, if the attack were on the application of the plan, surely it would have been necessary to make such an attack by means other than mere asseveration. Surely it would have been necessary to show at least one instance, if not to show enough to make a pattern.

Further, the petitioners' motion asked for faculty desegregation, not in the original plan, a timetable different from that in the plan, and a method of reassignment of pupils not only not contemplated by the plan but explicitly rejected by the trial court. Moreover, petitioners attack, in this Court, the eighteen criteria for transfer that once were part of the plan but that were abandoned, along with the administrative machinery. It is clear then, is it not, that the actual thrust of petitioners' motion was an attack on the plan as a whole, even though they had formerly approved it and moved its adoption.

Even though the usual notions of finality [*Brown*

Shoe Company v. United States, 370 U.S.294, 8 L.Ed.2d 510, 82 S.Ct.1502 (1962)] which would seem to preclude an attack by petitioners on the plan as a whole in view of their motion to adopt the plan (R. 38), and in view of their dismissal of their appeal (R. 173), may not be binding on these petitioners, still the history of the case shows that no bona fide attack is made upon the *administration* of the plan. And even if it were, two federal courts have ruled that administration has been fair and in good faith.

Thus, the actual question before the Court is simply this: Must *Shuttlesworth* be overruled? Or rather, that would be the question if Atlanta had not so substantially improved upon *Shuttlesworth*, along the lines suggested by *Goss*.

The alleged deficiencies of the plan, we submit, vanish if the plan is fairly considered from the standpoint of deliberateness as well as speed.

The basic assault on the plan by petitioners, for example, is that it does not contain any provision for "initial reassignment" of pupils but instead "freezes" petitioners into an existing segregated system of assignments and places on them a burden, not shared by white students, of getting out by transfer.

In the first place this precise argument was made in *Shuttlesworth* to no avail. See 162 F.Supp.at 375, note 3(V)(3).

In the second place, if deliberation as well as speed is taken into account the plan does no such thing. More correctly, what it does is "freeze" reassignments, (subject to freely granted applications for transfer) for a

limited period of time, thus avoiding the necessity of a chaotic reassignment of every student in every school at one time. This, plus the grade-a-year provision, constitute the only elements of deliberation which the plan contains; elements which petitioners would sacrifice entirely on the altar of speed.

That these provisions are merely transitory is well illustrated by the posture of desegregation in Atlanta at the present time. Progressing downward a grade a year, the Atlanta plan has now reached the eighth grade; that is, the first year of high school. (The system of junior high schools is not employed.) Admittedly, in the three years it has been in operation students in the affected grades had to apply for transfers or be "frozen" in. The fact that those who did apply were fairly treated is, for the moment, beside the point. But consider what will happen under the plan in 1964 and all succeeding years. As every student then and thereafter finishes the seventh grade he will and must receive an "initial" assignment to a high school without regard to race. At that point and thereafter the "freezing in" of existing assignments is over; although, of course, there will still be transfers for legitimate reasons not related to race.

In due course the plan will reach the first grade and initial assignments there will be made on the same basis. At this point, despite the protestations of petitioners, desegregation will be complete within the meaning of *Brown*.

In its brief the United States makes several suggestions which it refers to as "obvious solutions." It suggests, as such, an immediate reassignment of all students on the basis of proximity alone. Admittedly Atlanta has

recently resorted to proximity as a factor in making transfers;[5] but for administrative reasons Atlanta has never used either inflexible zones or proximity as the sole criterion either at the first grade or the high school level. It does not want to resort solely to inflexible zones or proximity now; and if faced with a choice would probably prefer a system of complete freedom of choice[6] conditioned only upon availability of facilities, with resort to proximity to settle priorities between two applicants where facilities were available for only one. Such a choice, obviously, bears no relation to integration or segregation and would be consistent with either.

But these suggestions are beside the point. Atlanta has an "obvious solution." Once it becomes clear that as the present plan progresses there will be initial assignments, without regard to race — in short, once it appears that the freeze-in of existing assignments is purely transitory — petitioners' argument that the Atlanta plan is inherently unfair is eliminated.

2. *No Case Has Been Made for Acceleration of the Atlanta Plan.*

This Court held in *Brown* v. *Board of Education of Topeka*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955), and again in *Cooper* v. *Aaron*, supra, that the precise speed for the accomplishment of desegregation was a matter within the discretion of the lower federal courts. Emphasis was placed in those cases upon the extreme variations existing between different cities with

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[5]See note 2, p. 7, supra.

[6]Dr. Letson testified: "In fact, pupils—pupils from all over the city attend schools all over the city." (R. 99).

regard to administrative and other problems involved in a transition from segregated to desegregated schools.

Two recent decisions of this Court have cast doubt upon the continuing validity of these previous rulings. As pointed out by petitioners and by the United States, this Court remarked in *Watson* v. *City of Memphis*, supra, and in *Goss* v. *Board of Education of City of Knoxville*, 373 U.S. 683, 10 L. Ed. 2d 632, 83 S. Ct. 1405 (1963), upon the passage of time since the *Brown* cases. The language taken out of context has been pressed into service for the purpose of reversing the carefully considered decision in the second *Brown* case that while the rights of the petitioners are present rights, nevertheless, a degree of gradualism in implementing desegregation is sometimes necessary.

It is true that some lower courts have ordered speed-ups in desegregation plans proffered to them for approval. On the other hand, in the spirit of the second *Brown* case and *Cooper* v. *Aaron*, supra, this Court has never even considered such a question. The opportunity to do so has been presented on more than one occasion. One of the issues in the lower court in *Cooper* v. *Aaron* itself related to the alleged fact that desegregation was proceeding too slowly. However, this Court, even though a full dress opinion was written, had nothing to say on the matter of speed except to reiterate the earlier position that it was a question peculiarly the concern of the lower federal courts.[7] Again, *Kelley* v. *Board of Education of City of Nashville*, 270 F. 2d 209 (C.A. 6th, 1959), presented this Court with an opportunity to take away from the lower federal courts discretion over the

[7]Each of the lower courts in this case has passed upon the speed of the Atlanta plan and found it satisfactory. (R. 159, 243).

question of speed of desegregation. The principal issue in the case was whether a twelve-year desegregation plan was too deliberate. The Court of Appeals for the Sixth Circuit ruled that this was a question for the discretion of the trial judge. This Court denied certiorari, 361 U.S. 924, with the Chief Justice and Justices Douglas and Brennan of the opinion that the writ should be granted. They, however, wished to review another issue in the case. No member felt that this Court should take over the discretionary function of establishing the exact amount of permissible time for each city affected by the *Brown* cases.

Both petitioners and the United States as amicus curiae have pointed out that there are cases in which the district courts or courts of appeals have required speed-ups in desegregation plans. The United States Court of Appeals for the Fifth Circuit did so in *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491 (C.A. 5th, 1962). The Fifth Circuit has also urged haste in several cases, including *Boson* v. *Rippy*, 285 F. 2d 43 (C.A. 5th, 1960), and *Davis* v. *Board of School Commissioners of Mobile County, Alabama*, 318 F. 2d 63 (C.A. 5th, 1963). The Fifth Circuit is therefore fully cognizant of the fact that this Court's requirement of all deliberate speed in the desegregation process includes emphasis upon speed as well as upon deliberateness.

This Court emphasized in *Cooper* v. *Aaron*, supra, that desegregation would be a process requiring different periods of time from one city to another and that this element of time was contingent upon many varying factors, including size of school systems, problems of crowding and shifting populations, and many other factors

more within the cognizance of the district courts and courts of appeals than of this Court.[8]

There would not seem to be occasion in this case for the Court to repudiate its holding in *Cooper* v. *Aaron* that the transition to desegregation should be supervised by the lower federal courts exercising the flexibility traditional to equity courts.

In the *Mobile County* case in 1963, the Fifth Circuit remarked sharply upon the fact that "the amount of time available for the transition from segregated to desegregated schools becomes more sharply limited with the passage of the years since the first and second *Brown* decisions." (318 F. 2d at 64). On the same day the same Court prescribed a twelve-year plan in *Stell* v. *Savannah-Chatham County Board of Education*, 318

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[8]The opinion of the District Court upon the petitioners' Motion for Further Relief in 1960, stated:

"(2) Throughout this litigation the Court has held to the opinion that delay in ordering the entire elimination of segregation in the Atlanta Public Schools could be justified only in the event that bona fide efforts were being made to eliminate the same under a reasonable and gradual Plan. If no good faith efforts were to be made to that end nothing could be accomplished by delay." (R. 49).

The order of the District Court on petitioners' Motion for Further Relief in 1962 stated:

"When this Court approved the Plan on January 20, 1960 many local conditions mitigating against a more speedy transition were considered (see 188 F.S. 401), these factors included the following:

There were in Atlanta 116,000 pupils, of which approximately forty per cent, or some 46,400, were Negroes. There was a rapid influx of children of school age into the city and a shortage of some 580 class rooms, many classes then being held in Churches and other buildings, and many having double sessions. Other problems confronted the School Board, caused by slum clearances and changes in residential patterns, to which may now be added complications arising out of large tracts of land being condemned for expressways." (R. 159)

F. 2d 425 (C.A. 5th, 1963). (R. 242). Thus, there are still being adopted twelve-year plans beginning four years after Atlanta.

If this Court is not to reverse its previous decisions and declare that desegregation must take place immediately in all places, then it would seem to us that it can scarcely undertake the task of making the delicate determination as to the precise speed of desegregation in every city, town and hamlet in the nation. In the nature of things, this Court cannot bring before it all the necessary information to make such decisions. It was in recognition of this fact that this Court in *Brown*, and again in *Cooper* v. *Aaron* explicitly delegated these questions to the lower federal courts. Also in recognition of this fact, this Court has steadily refused to consider such questions. Of course, this Court has the right and duty to supervise the lower federal courts in the exercise of their discretion. In this connection the Court pointed out in *Brown* and *Cooper* that the lower federal courts should exercise a continuing supervision over school officials so as to assure themselves that the school officials were acting in good faith to the end of accomplishing desegregation as expeditiously as possible. Good faith has been made the litmus paper for the transition to desegregation.

The two lower federal courts have explicitly held that the respondents are proceeding in good faith to carry out the desegregation plan submitted by them and approved by the District Court. The District Court stated as follows:

> "The Plan heretofore approved by this Court, and now under attack, has been administered fairly

> and in good faith by defendant Atlanta Board of Education, the local authorities have given utmost cooperation in maintaining law and order, and the number of students being transferred . . . from previously designated colored schools to previously designated white schools is increasing at an accelerated rate each year as the lower grades are reached. This Court feels that the public interests demand that the Plan now in operation be continued according to its terms and not be summarily displaced by the new Plan of Desegregation proposed by plaintiffs." *Calhoun* v. *Latimer*, 217 F. Supp. 614, 7 Race Rel. L. Rep. 1054 (N.D. Ga., 1962). (R. 156, 159).

The Circuit Court (Judge Bell and Judge Lewis of the Ninth Circuit) concurred in this finding of good faith and emphasized the progress taking place in the Atlanta school system:

> "*In the meantime the Atlanta plan is working.* Progress is the test, and the necessary transition is taking place. There has been no trouble. All responsible officials and many private citizens have cooperated to make it work, and to preserve public education." (R. 245) (Emphasis supplied).

At the same time, Judge Bell made it clear that the Fifth Circuit would not be reluctant to carry out the duties delegated to it regarding supervision of the transition to desegregation:

> "We do wish, however, to point out some fundamentals to be borne in mind in the future handling of this and like matters where an approved plan is in operation. Whether to effect a plan, to speed it up, or to otherwise modify it is in the first instance for the school board. This is likewise true as to problems arising in connection with the administration of a plan. The courts are ill equipped to run the schools. Litigants must not ignore school offi-

> cials, and school officials must not abdicate their function to the courts. They, like the courts, are bound by the Constitution as interpreted by the Supreme Court, *Cooper* v. *Aaron*, supra. With these principles in mind, this record discloses no problem that could not be resolved between appellants and the school officials based on the judgment of the school officials as educators, with the application of wisdom, forebearance and mutual trust to the educational purpose of schools." (R. 245).

It is quite clear that the Fifth Circuit has not been and will not be derelict in its duty in this regard and needs no instruction from this Court. It is pointed out by the petitioners that the Fifth Circuit has, when it considered it appropriate under the circumstances, required acceleration of desegregation plans. In *Davis* v. *Board of School Commissioners of Mobile County*, supra, the Fifth Circuit instructed the District Court to be about the business of desegregation and made it clear that if he continued to show himself reluctant, his discretion would be displaced by the Fifth Circuit.

In another instance, the Court of Appeals for the Fifth Circuit anticipated the ruling by this Court in *Goss* that transfers could not be granted to white children for the purpose of escaping a desegregated school. *Stone* v. *Members of the Board of Education of Atlanta*, 309 F. 2d 638 (C.A. 5th, 1962).

While the good faith of the respondents has been noted by both the lower courts, including the dissenting judge in the Fifth Circuit, we would point out that those remarks were based upon a record including the earlier stages of the operation of the desegregation plan. Since that time, the respondents have voluntarily dispensed

with all criteria of the desegregation plan that could have about them even the suspicion that it was intended to use them for purposes of avoiding desegregation. As a result, in September of 1963, the plan, though it remained a transfer plan, was based upon the one simple criterion of proximity of residence to school. Scheduled for discard in 1964 is the entire machinery of the original plan relating to the filing and processing of formal applications for transfer, including time and necessity of filing, the use of tests, and the necessity of pursuing the administrative remedies prescribed in the plan.

Curiously enough, the very good faith of the respondents is now urged against them. It is said that, since Atlanta is handling the transition to desegregation in such a satisfactory way, it should be compelled to scrap the plan in operation and adopt a different one. There seems to be implicit in this, albeit turned on its head, the argument repudiated by this Court in *Cooper* v. *Aaron*, that disagreement or violent opposition to desegregation was a factor that could stay the implementation of the *Brown* decision. That is to say, petitioners urge that since Atlanta is accepting the transition to desegregation peacefully and satisfactorily, the process should be speeded up. But *Cooper* v. *Aaron* made clear that desegregation could not be slowed down by violent opposition, and that seems to be merely another way of saying that it need not be speeded up because of peaceful acceptance.

The pace of desegregation was not dictated by considerations of the sort just mentioned. Grade-a-year desegregation was dictated by the size of the school system and the attendant administrative problems. In this con-

nection we would ask the Court to compare *Evans* v. *Ennis*, 281 F. 2d 385 (C.A. 3d, 1960). In that case it was held that a twelve-year desegregation plan was too slow for the State of Delaware but it was pointed out that there were, in the entire state, only some 7,000 Negro students and, calculating from the percentage of Negro students who had opted to go to white schools, the Court concluded that the number of transfers or reassignments to be accommodated amounted to something less than 200 school children. In reaching its decision the Court distinguished *Kelley* v. *Board of Education of City of Nashville*, supra, on the basis of the size of the school system affected and particularly the ratio of Negro to white children. It was made very explicit, then, by the Third Circuit, that the size of the school system was a dominant consideration in the determination of the appropriate speed for desegregation.

The District Court and the Court of Appeals in this case have, in their discretion, determined that a twelve-year pace is an appropriate one for Atlanta. As we have seen, in so exercising their discretion, the lower courts were not motivated by any reluctance to achieve desegregation, but acted with the principles enunciated by this Court in the *Brown* decisions, *Cooper* v. *Aaron*, *Watson*, and *Goss* in the forefront of their minds.

Only one thing has happened to suggest an acceleration of the plan. That is the degree of acceptance of desegregation that has been shown by Atlantans and school officials. *Cooper* made clear that this is an irrelevancy.

3. *It Was a Proper Exercise of Discretion to Delay Consideration of Faculty and Staff Re-assignments.*

Brown v. *Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), held that a policy of systematic segregation of school children was unconstitutional; no explicit decision was made regarding assignment of teachers, or other school personnel. It was based upon the purported fact that separate schools are inherently unequal and that segregation in itself tends to have a psychological impact upon children in the minority group that is detrimental to their ability to learn. This decision was supported by the writings and findings of psychologists and sociologists, and the Court seemed to be stating what it considered to be true, as a matter of fact. No finding of fact has been made in this case or, so far as we are aware, any other, and no evidence was presented in this case, to support an allegation that any given method of assigning teachers, much less other school officials, has any known psychological impact upon the students. Therefore, it does not seem to us that *Brown* requires any action with regard to teacher assignment.

However, should *Brown* require such, we believe that the decision of the District Court postponing consideration of this problem was justified. For several reasons, teacher assignment is a different problem from pupil assignment.

In the first place, teachers cannot simply be reassigned against their wishes, as pupils can, since teachers have the option to leave the school system, as pupils cannot. Teachers seek employment in the school system only if

that employment is attractive to them in various respects. The City of Atlanta is twenty miles, or so, across, and teachers, as much as any other persons, want their employment reasonably close to home. If we were to shuffle teacher assignments, we should surely lose a substantial part of our staff. It seems to us that the only system that can work for teacher assignment is a system of free choice, as we now have.

It also appears to us that a quota system for teachers would be contrary to the spirit of the equal protection clause. If the thrust of the *Brown* decision really is that a school with an 80% white enrollment and a 20% Negro enrollment must have 80% white teachers and 20% Negro teachers, then the constitutional rights of teachers, and indeed the spirit of the Constitution itself, are surely sacrificed to the constitutional rights of the children to a desegregated education.

We cannot believe that *Brown* requires such a result. We also believe that this is an unreal issue before this Court. If, after desegregation of the school system is accomplished, there should be a given school with 80% white enrollment and 20% Negro enrollment, this will presumably be because the neighborhood served by the school has that racial composition. It would likely be that among the Negroes there would be teachers desiring assignment to that particular school. There would be no reason for the respondents to deny them such an assignment and it would be done. That is a far cry, however, from what is urged upon this Court by the petitioners, who seem to contemplate a reshuffling of the school teachers against their wills under Court order at this time.

For these reasons the District Court and the Court of Appeals thought that it was appropriate that they delay consideration of the problem of teacher assignment. We believe this was a proper exercise of their discretion.

CONCLUSION

Much of the formal record in this case is ancient history. This Court has said that district courts must supervise the progress of desegregation. There can be no perception of this movement if the seventeen criteria once part of the plan are viewed as though they were still present. Here is the progress:

In 1961 there were seventeen criteria used to test the application of a Negro to transfer to a white school. There were included special achievement and personality tests. All but about three of the criteria proved useless and were discarded even in the first year.

In 1962 the special tests were voluntarily dropped.

In 1963 all criteria except proximity of residence to school were dropped, but applications for transfer were still necessary.

In September, 1964 the feeder system takes hold. Then even applications for transfer are no longer necessary for the eighth grade and initial assignments to high schools will be based upon geography alone.

As previously explained, the administrative machinery for screening applications for transfer has been scrapped, since the transfers are routinely granted.

This progress is not looked upon with favor by the petitioners and yet only five years ago Atlanta citizens'

groups were desperately trying to avoid the loss of public education, and three years ago the City made its first steps toward desegregation a source of pride to the entire country. We led the way that other cities in the south have followed. A page of history is worth a volume of logic; part of Atlanta's history includes this commendation from the late President of the United States:

August 31, 1961
Atlanta Constitution

"Kennedy's
Praise for
Atlantans

Constitution Washington Bureau

Here is the text of President John F. Kennedy's comment during his press conference Wednesday relating to the integration of Atlanta's schools:

"I have several announcements to make.

"First, I want to take this opportunity to congratulate Governor Vandiver, Mayor Hartsfield of Atlanta, Chief of Police Jenkins, Superintendent of Schools Letson and all of the parents, students and citizens of Atlanta, Georgia, for the responsible, law abiding manner in which four high schools were desegregated today.

"This was the result of vigorous efforts for months by the officials of Atlanta and by groups of citizens throughout the community.

"Their efforts have borne fruit in the orderly manner in which the desegregation was carried out with dignity and without incident," Kennedy continued.

"Too often in the past such steps have been marred by violence and disrespect for law.

> "I strongly urge the officials and citizens of all communities which face this difficult transition in the coming weeks and months to look closely at what Atlanta has done and to meet their responsibility, as the officials of Atlanta and Georgia have done, with courage, tolerance and, above all, with respect for the law."

In the two and one-half years since that press conference a revolution in public education has been effected here. Two Courts have approved the progress made and have noted the accelerating pace imparted to it. Against that background petitioners say that we must scrap it all after less than three years. Surely there is no occasion for such a decision.

We respectfully submit that the decision of the court below should be affirmed.

Respectfully submitted,

A. C. Latimer

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IN THE

Supreme Court of the United States

October Term, 1963

No. 623

FRED S. CALHOON, *et al.*,

Petitioners,

—*v.*—

A. C. LATHER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE STATE OF GEORGIA AS AMICUS CURIAE

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IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE STATE OF GEORGIA AS AMICUS CURIAE

Questions Presented

Whether the Atlanta Plan of desegregating the public schools, approved by both the District Court (217 F. Supp. 614) and Court of Appeals below (321 F. 2d 302), is constitutionally defective (1) In its basic approach to achieving desegregation, through application of assignment procedures now based solely on considerations of choice, space and proximity, on a grade-a-year basis, commencing with the high school grades and proceeding downward, (2) Insofar as it contemplates that the transition will be achieved over an eleven-year period, and (3) For the reason that the plan

presently contains no definite provisions for allocation of teachers and other personnel on a non-racial basis, the courts below having held these matters in abeyance pending development of further progress under the plan.

Interest of the State of Georgia

Prior to 1961, the official policy of the State of Georgia was one of unqualified opposition to desegregation of public education in any form. Existing statutes provided for the cutting off of all public funds to desegregated schools.[1] Practically all candidates for state office were elected on a pledge to defend segregation. In early 1961, however, state laws purporting to cut off funds to the University System in the event of desegregation, identical in terms to those applicable to the common schools, were held invalid by the United States District Court for the Middle District of Georgia in a suit involving the University of Georgia. See *Holmes* v. *Danner*, 191 F. Supp. 394 (D. C. Ga. 1961).

In a historic, unprecedented move, Governor Ernest Vandiver addressed the General Assembly which was then in session, urging the repeal of all state laws requiring segregation in the common schools. This was done [2], thereby enabling the desegregation of the Atlanta schools to proceed in September without the spectacle of a state-federal conflict similar to that experienced in other states.

We would be less than candid should we fail to dispel the inference that the state thereby suddenly reversed its policy

[1] Ga. Laws 1955, p. 174; Ga. Laws 1956, p. 6; Ga. Laws 1959, p. 15; Id., p. 157, as amended, Ga. Laws 1960, p. 147. All General Appropriations Acts, beginning in 1951 (Ga. Laws 1951, p. 417) and continuing through the Act of 1956 (Ga. Laws 1956, pp. 753, 758), which remained in effect (Constitution of Georgia, Art. VII, Sec. IX, Par. II) until passage of a new Act in 1961 (Ga. Laws 1961, p. 356), contained similar cut-off provisions.

[2] Ga. Laws 1961, pp. 35, 37.

of segregation in exchange for one of zealous pursuit of integration. But the undisputed fact is that the 1961 session of the General Assembly did reflect a distinct change in attitude. Respect for law and order, obedience to the Supreme Law—notwithstanding disagreement therewith—and a determination to permit each political subdivision to solve its problems in accordance with local conditions, then and now, represent the official thinking of all branches of the state government.

In keeping with this new approach, Atlanta has and is now making its constitutional obligations with a fidelity which has won universal acclaim and respect. It should be permitted to continue in the same manner. Granted that the degree of desegregation may not have reached that desired by plaintiffs, it is too early to condemn it as too "deliberate" and lacking sufficient "speed," particularly since the first of [3] the two steps producing the greatest impact is shortly to be achieved in September, 1964, when the plan reaches the eighth grade, requiring for the first time reassignment initially of all pupils entering the eighth grade according to the limited criteria now retained in the plan.

The Atlanta Plan should be permitted to run its course. Certainly it should not be replaced before receiving its most crucial test in September, 1964. The State of Georgia feels a vital interest in assuring that the myriad problems of its political subdivisions be handled by local officials with solutions locally derived. Self-determination thus manifested projects the doctrine of States Rights on its highest plane.

[3] The second major step will occur when the plan reaches the first grade, at which time all initial assignments will be made under the plan on a non-racial basis

Statement

The statement of facts concerning this case has been adequately and completely set forth in the Petition for Certiorari and the several briefs filed by the parties and the United States subsequent thereto. Only a brief summary of the basic facts need be repeated here.

Filed in the district court on January 11, 1958 (R. 2), this suit finally culminated in a judgment directing that the plan of desegregation be placed in operation at the beginning of the September, 1961 Term (R. 47).

Patterned in part after the Alabama pupil placement Act[4], held facially constitutional in *Shuttlesworth* v. *Birmingham Board of Education*, 162 F. Supp. 372 (1958), aff'd. 358 U. S. 101, 3 L. Ed. 2d. 145 (1958), the Atlanta Plan became operative as to grades twelve and eleven at the term which began in September, 1961, and has subsequently become operative as to grades ten and nine.

The history of the Atlanta Plan has been one of evolution. Even during its first year of operation, only three of the nineteen criteria (R. 34) originally approved on January 20, 1960 (R. 38), were actually applied.[5] In 1962, the special tests previously given applicants for transfer were discontinued (R. 105, 138), and the only criteria applied were "probability of academic success" and "proximity to the schools requested."[6] In 1963, no factor was used except that of "proximity to the school requested," [7] which resulted in granting of 62% of the applications for transfer.[8]

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[4] Code of Alabama, Recompiled (1958), Title 52, §61 (1)–§61 (12). See also 1 R. R. L. R. 235 (1956) for the original Act, prior to its amendment in 1957.

[5] See letter of the Deputy Superintendent, Brief for Respondent, pp. 6–7.

[6] Brief for Respondents, p. 7.

[7] Id.

[8] Id., p. 6.

The "Motion for Further Relief" filed April 30, 1962 (R. 53), based in large part upon many of the plaintiffs' original objections to the plan (R. 17, 31), was denied by the district court.[1] Upon appeal to the United States Court of Appeals for the Fifth Circuit, the judgment of the district court was affirmed (R. 229) with directions (R. 241, 254).

The holding of the Court may be summarized as follows:

(1) The burden of sustaining a plan is on the Board. But where as here this has been done, the burden of later showing it deficient is upon the plaintiffs (R. 234).

(2) "Gradualism in desegregation if not the usual, is at least an accepted mode." (R. 239). Reviewing the results under the plan, the court concludes that a speed-up is not required.

(3) The basic feature of the Atlanta plan, i. e., desegregation by transfer applications, is acceptable so long as the transfer criteria are also applied to new pupils entering the desegregated grades for the first time (otherwise, the criteria would in practice be applied only to Negroes). Also, for the first time, in 1964 the plan will lay hold to the feeder system, when it becomes applicable to the eighth grade, for here the transfer criteria and procedures must be applied system-wide, as seventh grade pupils will be graduating from one school (elementary) to another (high school). This fact will itself greatly dissipate segregation in the higher grades as the eighth grades move up. (R. 241).

(4) The Atlanta system is in a period of transition. The attitude of school officials and their past conduct must be considered. As jurisdiction is reserved, time will tell whether other deficiencies will be found (R. 244).

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[1] R. 156. The opinion is reported as *Calhoun v. Latimer*, 217 F. Supp. 614 (D. C. Ga. 1962).

(5) The Court did not err in postponing consideration of the issue of desegregation as to facilities and staffs (R. 244).

On motion for rehearing, the Court denied same with these directions:

(a) That transfer procedures be applied to students new to a school, with respect to desegregated grades, and to informal transfers.

(b) The requirement that a pupil be equal to or above the median of the school to which transfer is sought can not be used where applied only to Negroes.

(c) The same is true of the interview procedure (R. 258).

ARGUMENT

1. The Plan Constitutes a Valid Method of Transition to a Non-Segregated School System

The remarkable fact about the Atlanta Plan is that not only has it in practice evolved into something quite different from its original intendment, but the decision of the Court of Appeals, while purporting to affirm the judgment below, has so far modified the plan as to remove completely the principal features to which objection is made, thereby rendering moot most of the argument contained in the briefs of petitioners as well as the United States.

The basic argument directed against the plan is that it is merely a pupil transfer plan, that as such it does not constitute a valid start toward desegregation, and that it would be constitutionally relevant only when used with respect to a system or grades already reconstituted on a desegregated basis. In this, the same argument is made as was directed against the Louisiana placement law in *Bush v. Orleans Parish School Board*, 204 F. Supp. 568 (D. C.

La. 1962)[1], an argument which also has prevailed in a number of other cases.[2]

The principal part of the plan relied upon in support of this argument of petitioners is so much thereof as provides:

> "All existing school assignments shall continue without change until or unless transfers are directed or approved by the Superintendent or his duly authorized representative" (R. 34–35).

The inference is then made that the Atlanta Plan is thereby placed in the same category as the "Pupil Transfer Plans" involved in the cases just cited, and hence is defective in that all initial assignments are made on a racial basis, subject to the right of a student to obtain transfer under the placement criteria, under the principle that "Negro children *cannot be required to apply for that to which they are entitled* as a matter of right." *Northcross* v. *Board of Education of Memphis*, 302 F. 2d 818, 823 (C. A. 6th 1962), cert. den. 370 U. S. 944 (1962).

To begin with, we question whether in any event, the Constitution prohibits a state from maintaining the status

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[1] In this case the court declared: "Moreover, where a school system is segregated, there is no constitutional basis whatever for using a pupil placement law. A pupil placement law may only be validly applied in an integrated school system, and then only when no consideration is based on race. To assign children to a segregated school system and then require them to pass muster under a pupil placement law is discrimination in its rawest form." (p. 570).

[2] *Armstrong v. Board of Education of Birmingham*, 323 F. 2d 333 (C. A. 5th 1963); *Davis v. Board of School Commissioners of Mobile County*, 322 F. 2d 356 (C. A. 5th 1963); *Bell v. School Board of Powhatan County*, 321 F. 2d 494 (C. A. 4th 1963); *Mapp v. Board of Education of Chattanooga*, 319 F. 2d 571 (C. A. 6th 1963); *Bradley v. School Board of Richmond*, 317 F. 2d 429 (C. A. 4th 1963); *Flax v. Potts*, 218 F. Supp. 254 (D. C. Texas 1963); *Augustus v. Board of Escambia County*, 306 F. 2d 862 (C. A. 5th 1962); *Green v. School Board of Roanoke*, 304 F. 2d 118 (C. A. 4th 1962); *Northcross v. Board of Education of Memphis*, 302 F. 2d 818 (C. A. 6th 1962); *Jeffers v. Whitley*, 309 F. 2d 621 (C. A. 4th 1932); *Dodson v. School Board of Charlottesville*, 289 F. 2d 439 (C. A. 4th 1961); *Norwood v. Tucker*, 287 F. 2d 798 (C. A. 8th 1961); *Dove v. Parham*, 282 F. 2d 256 (C. A. 8th 1960).

quo so long as reasonable opportunities are afforded pupils to extricate themselves therefrom; for the Constitution does not compel integration, it merely prohibits state-enforced segregation,[3] and segregation can hardly be said to be state-enforced where the state has afforded a ready remedy. Support for this proposition is also found in the fact that the Alabama law, upheld by this Court in *Shuttlesworth*, also envisioned the continuation of existing assignments,[4] yet the court, in upholding the law, declared:

> "The School Placement Law furnishes the legal machinery for an orderly administration of the public schools in a constitutional manner by the admission of qualified pupils upon a basis of individual merit without regard to their race or color." 162 F. Supp. at 384.

In the present case, however, it is not necessary to speculate upon this proposition, as it is not presented here by the facts, assuming for the moment the correctness of the dicta in *Armstrong* v. *Board of Education of Birmingham*, 323 F. 2d 333, 337 (C. A. 5th 1963) to the effect that "The burden of initiating desegregation does not rest on Negro children or parents or on whites, but on the School Board."

The simple fact of the matter is, that the Atlanta Plan does not contemplate the making of initial assignments to schools on racial grounds, with an option to aggrieved pupils

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[3] *Briggs v. Elliott*, 132 F. Supp. 776, 777 (D. C. S. C. 1955); *Thompson v. County School Board of Arlington County*, 144 F. Supp. 239, 240 (D. C. Va. 1956), aff'd. 240 F. 2d 59 (C. A. 4th 1957), cert. den. 353 U. S. 911 (1957); *Kelley v. Board of Education of Nashville*, 270 F. 2d 209, 226 (C. A. 6th 1959); *School Board of Newport News v. Atkins*, 246 F. 2d 325, 327 (C. A. 4th 1957), cert. den. 355 U. S. 855 (1957); *School Board of Charlottesville v. Allen*, 240 F. 2d 59, 62 (C. A. 4th 1956), cert. den. 353 U. S. 910 (1957); *Avery v. Wichita Falls Indep. School District*, 241 F. 2d 230 (C. A. 5th 1957), cert. den. 353 U. S. 938 (1957); *Borders v. Rippy*, 247 F. 2d 268 (C. A. 5th 1957).

[4] Alabama Code, Recompiled (1958), §61 (3).

to transfer out by passing muster under burdensome transfer criteria. Under the Atlanta Plan, the situation can best be summarized as follows:

> (1) With respect to pupils already in a given school, their assignments do remain fixed there, subject to freely given transfers based upon the criteria of choice, space and proximity. The same criteria, under the decision of the Court of Appeals below, will hereafter be applied to all transfers, "formal" or "informal" (R. 241).
>
> (2) With respect to pupils coming into a school for the first time and entering a grade already reached by the Plan, initial assignment criteria of choice, space and proximity will be applied to all such pupils, regardless of race (R. 241; Brief of Respondents in Opposition, pp. 10–11).
>
> (3) In September 1964, when the plan reaches the Eighth Grade, in which pupils have graduated from one school to another, the "feeder system" can no longer be used, but pupils must be assigned according to the assignment criteria—choice, space and proximity, a fact which will greatly accelerate the progress of the desegration. The same procedure will be followed on initial assignments to the first grade when the plan reaches that grade in 1971 (R. 241).

The features which distinguish the Atlanta Plan from those condemned in the collection of cases hereinbefore cited (Footnote 2, supra) are the non-racial assignment of pupils new to a school, whether with respect to a pupil moving into the Atlanta system from elsewhere and entering a grade already reached by the plan, or whether with respect to pupils entering either the Eighth Grade or the First Grade. As stated by the Court of Appeals below:

> "The main thrust or force of its application will be in the admission and assignment from elementary to high schools, and to the first grade. This means that

> for the school term beginning in September 1964, the plan will lay hold of the feeder system for the first time. This follows from the fact that such factors as are used for assignment and transfer must be used system wide in the assignment and transfer of seventh grade students to the eighth grade since they will be moving from one school to another, elementary to high school. This will remove even the residuum of the dual system from this grade, and will rapidly dissipate from the other high school grades as other succeeding elementary grades reach the eighth grade. The dual system will be entirely eliminated when the plan reaches the first grade." *Calhoun* v. *Latimer*, 321 F. 2d 302, 310 (C. A. 5th 1963).

This is identically the same type plan devised by the Court of Appeals in *Armstrong* (323 F. 2d 333) and *Davis* v. *Board of School Commissioners of Mobile County*, 322 F. 2d 356 (C. A. 5th 1963).

The only feature left in the plan which plaintiffs conceivably could attack is so much thereof as preserves the assignments of pupils already attending a school. But this contention has already received all the answer it requires in another well-considered opinion, *Monroe* v. *Board of Commissioners of Jackson, Tennessee*, 221 F. Supp. 968 (D. C. Tenn. 1963), where a similar provision allowing pupils to remain in the school they were then attending was upheld, declaring:

> "This good reason is the obvious advantage of a continuation in familiar surroundings with the same teachers and fellow students. This provision will, of course, expire by its own terms in a relatively few years."

Where children are already enrolled in a given school, in most instances they have become settled, and to arbitrarily reassign everyone would needlessly disrupt existing re-

lationships. This consideration has real meaning for school administrators. The most crucial issue in public education in Georgia today is not desegration, but consolidation of schools and reassignment of pupils in such a manner as to achieve a balance in pupil-teacher loads. Hardly a month goes by that the State Board of Education is not beset with bitterly contested appeals involving consolidation of schools and reassignment of pupils. Even stripped of any racial involvements, these disputes almost always generate strife. Conceding that delay is not to be countenanced simply because of hostility to the supreme law, it goes without saying that education can not survive in an atmosphere of acrimonious confusion. As stated recently:

> "In testing the plan submitted we should remind ourselves of a fact seemingly often overlooked by those who are anxious for rapid social change, this being that the chief function and primary concern of the Board of Education is not the preservation of the status quo in race relations, nor is it the advancement of social revolution. The Board's primary duty is to provide good educational facilities and operate them in an orderly manner and in an atmosphere free from turmoil and tension. While it is this Court's duty to order an end to the segregated system, which we have done, we deem it no less proper that we accord to the local school authorities superior knowledge with respect to the mechanics of a plan and the timing of its effectiveness." *Gaines* v. *Dougherty County Board of Education*, 222 F. Supp. 166, 170 (D. C. Ga. 1963).

What we are here saying is that a wholesale reassignment of pupils in any school system will produce resentment, confusion and chaos quite apart from racial entanglements. Atlanta, like other school systems in Georgia, is dependent

upon public support for the financing of needed school buildings.[5]

Certainly, it is no valid objection that the plan begins in the twelfth grade and proceeds downward. In upholding a plan substantially identical to that of Atlanta, Judge West declared in *Davis* v. *East Baton Rouge Parish School Board*, 219 F. Supp. 876, 883 (D. C. La. 1963):

> "Plaintiffs object to the plan of desegregation commencing at the twelfth grade level rather than at the first grade level. No valid reason was, or could be, advanced by the plaintiffs in support of this objection. In the process of desegrating schools throughout the country, many different plans have been successfully employed. Some areas have preferred to commence desegration at the first grade level, while others, with equal or perhaps even greater success, have commenced at the twelfth grade level. Among the cities employing the latter plan are: Little Rock, Arkansas; Pulaski, Kentucky; Harlan, Kentucky; Taylor, Kentucky; Atlanta, Georgia; Anderson County, Tennessee; Norfolk, Virginia; Hot Springs, Arkansas; Cumberland, Kentucky; Spencer, Kentucky; Donville, Kentucky; Dorchester, Maryland; Wilson County, Tennessee, and Warren County, Virginia."

The provision retaining intact all existing assignments, subject to right of transfer, is certainly sustainable as an interim measure. *Dodson* v. *School Board of Charlottesville*, 289 F. 2d 439, 444 (C. A. 4th 1961); *Hill* v. *School Board of Norfolk*, 282 F. 2d 473 (C. A. 4th 1960). Nor should Atlanta be penalized for failing to move forward at a time when it was faced with laws, the legality of which was not then determined, which threatened a cut-off of funds in the event of

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[5] Georgia Constitution, Art. VII, Sec. VII, requires approval of voters before indebtedness can be incurred by any political subdivision.

desegregation. *Jones* v. *School Board of Alexandria*, 278 F. 2d 72, 75 (C. A. 4th 1960).

The desegregation process may be achieved in a number of ways. One obvious method is a wholesale reassignment of all pupils on a geographical basis as plaintiffs would have. According to our understanding, this harsh course was not even followed in toto in the District of Columbia. See 2 R. R. L. R. 210, 211 (1957), Or, a school system might adopt a zone system, effectuating the same on a grade-a-year basis, beginning with the lower grades and going up, as was done in Nashville. See *Kelley* v. *Board of Education of Nashville*, 270 F. 2d 209 (C. A. 6th 1959), cert. den. 361 U. S. 924 (1959), or a system might, on a grade-a-year basis, give pupils the choice of attending the formerly white or formerly colored schools nearest their homes, as has been done in Houston, see *Houston Indep. School District* v. *Ross*, 282 F. 2d 95 (C. A. 5th 1960); 5 R. R. L. R. 709, and in New Orleans, see *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491 (C. A. 5th 1962), and in Obion County, Tennessee, see *Vick* v. *County Board of Education of Obion County*, 205 F. Supp. 436 (D. C. Tenn. 1962). Or, a system might give every child the option of choosing the school that he will attend anywhere in the system, as we understand is now the case in Little Rock, and is substantially the plan in effect in Louisville, Kentucky, see Carmichael, *The Louisville Story*, p. 84 (1957), as well as in New Rochelle, New York, see *Taylor* v. *Board of Education of New Rochelle*, 195 F. Supp. 231 (D. C. N. Y. 1961), aff'd. 294 F. 2d 36 (C. A. 2nd 1961), cert. den. 368 U. S. 940 (1961). Likewise, a system might do as Atlanta has done, for as said in *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491, 503 (C. A. 5th 1962):

> "We observe again that desegration procedures, within reasonable limits, must be flexible in order to

> fit local needs and new situations as they arise and present problems. Here, as in Augustus v. Board of Public Instruction of Escambia County, 5 Cir., 1962, 306 F. 2d 862, we say that the primary responsibility for judicial supervision lies with the district court. It is the tribunal best qualified to wrestle with specifics. 'We are reluctant to substitute our judgment for that of the district court . . .'"

2. The Court Below Did Not Err in Refusing To Speed Up The Process of Desegregation or in Postponing Reassignment of Faculty and Other Personnel

Little can be added to what has been well-presented in the brief of respondents. We should emphasize, however, as did the Court of Appeals below (R. 241) that the process of desegregation will automatically be speeded up at the beginning of the 1964–65 Term, when all pupils entering the high schools (eighth grade) will be initially assigned on a non-racial basis, a step which will be reflected in all subsequent years thereafter. Another acceleration will take place in 1971 when the plan reaches the first grade. In the meantime, due to the Atlanta Plan's having started at the higher grades and proceeding downward, the students in the higher grades will have had the opportunity of obtaining transfers under the liberal procedures now in effect.

Secondly, with respect to reassignment of faculties and other school personnel, it is a most fundamental proposition that a litigant lacks standing to assert the constitutional rights of another. *McCabe* v. *Atchison Topeka & Santa Fe Railway Co.*, 235 U. S. 151, 162; 59 L. Ed. 169 (1914). This proposition was recognized in the leading case dealing with the present contention, *Augustus* v. *Board of Public Instruction of Escambia County*, 306 F2d 862, 868 (C. A. 5th 1962), where the Court of Appeals held (1) That in view of the allegation in the complaint that this practice "injured plain-

tiffs," the court should not resolve the issue on motion to strike, but should await the development of evidence, and (2) That this evidence need not be considered at once, but could be postponed pending completion on further progress in the desegregation of the pupils. To begin with, there is no clear-cut allegation of injury in the complaint in this case as was contained in the complaint in the Escambia case (R. 4–5). Moreover, unlike *Escambia*, this case has been tried on the merits, and plaintiffs have not produced any evidence showing injury. The basis of this Court's decision in the first *Brown* case[6] was a finding of injury based upon evidentiary consideration. See *Taylor* v. *Board of New Rochelle*, 191 F. Supp. 181, 192 (D. C. N. Y. 1961). At this stage, no court can determine whether the practice does cause injury, and for that reason, the matter should be held in abeyance, as was done in the *Escambia County* case. Of course, where in any case such a finding is made, a different question is presented. *Board of Public Instruction of Duval County* v. *Braxton*, 326 F2d 616 (C. A. 5th 1964). See also, in accord with the principle of holding this question in abeyance, but declaring that in any event pupils can not attack assignments of school personnel other than teachers and principals, *Mapp* v. *Board of Education of Chattanooga*, 319 F2d 571 (C. A. 6th 1963).

CONCLUSION

The first of the two most significant steps in the Atlanta Plan will take place in September 1964. Because the primary responsibility in this field is on the Board and the local courts, *Brown* v. *Board of Education of Topeka*, 349 U. S. 294, 299, 99 L. Ed. 1083 (1955), all of whom have acted forthrightly in the premises, and because the courts below are better able to draw inferences and appraise the situa-

[6] *Brown* v. *Board of Education of Topeka*, 347 U. S. 483 (1959).

tion, *Wright* v. *Rockefeller*, ... U. S. ..., 11 L. Ed. 2d 512 (1964), the plan should be permitted to run its course. The judgment below should be affirmed.

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IN THE

Supreme Court of the United States

October Term, 1963

No. 623

FRED S. CALHOUN, *et al.*,

Petitioners,

—v.—

A. C. LATIMER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

MEMORANDUM OF FACTS FILED BY RESPONDENTS PURSUANT TO DIRECTION OF THE COURT

INTRODUCTION.

The confusion and apparent conflict between the record and the oral argument in this case came about by reason of the fact that the case was argued on a record which was then two years old. In the intervening period the actual situation in Atlanta, as respects both policies and practices, had drastically changed, particularly as a result of the decision of the Circuit Court and its implementation by the Atlanta School Board. These changes which did not appear in the record then came out in

argument and in response to questions from the Court. Hence the confusion. If this circumstance has inconvenienced the Court or embarrassed opposing counsel, we respectfully ask the forgiveness of both. If we have departed from the record, it was unavoidable. The reasons for this were pointed out in our brief in opposition. There we said (p. 9):

> "The most important changes in the plan, however, are those that have taken place as a result of the opinion of Judge Bell, or are planned for September, 1964. These are not in the record, of course. We are dealing with a record made in the first days of desegregation, yet the Court is asked to assess the degree of progress toward a goal made over a period of time. We do not see how that can fairly be done unless we, as attorneys and spokesmen for the school board, may make reference to things that have occurred after the making of the formal record."

In short, what we were attempting to do was to argue the case not on the basis of what the Atlanta situation *was* but what it *is*, based on changes which we conceived to be implicit in the lower court's opinion.

For the convenience of the Court we have arranged the material in this response in question and answer form, the questions being intended in each case to summarize those asked by the Court. The answers in each case show the record reference or the authority on which they are based. In order that there be no question as to the present policies of the Atlanta school authorities, we also include a confirming resolution of the Atlanta Board

of Education and an affidavit from the Superintendent of Schools.

QUESTIONS ANSWERED.

QUESTION (by Chief Justice Warren)

Where in the record or in the briefs does it appear that the Atlanta Board of Education has by formal action adopted a present policy of making initial assignments or granting transfers on the basis of freedom of choice or proximity?

ANSWER:

At the time of oral argument there had been no such formal resolution. This was admitted in response to a direct question by the Chief Justice. It had been publicly stated, however, that under the decision of the Circuit Court the only criteria left in the Atlanta plan were freedom of choice, availability of facilities, proximity to schools, and grade-a-year. (See Affidavit of Superintendent Letson, infra, p. 13.) That such was the situation was also indicated in the briefs. (See Brief for Respondents, pp. 14-15; see Brief for State of Georgia as Amicus Curiae, p. 9.) Availability of facilities as a criterion was recited in the preamble to the original Atlanta plan (R. 11). Availability of facilities is one of the "other relevant matters" (R. 12) which per force are a part of any school assignment and transfer plan. Choice was one of the criteria contained in the original plan (R. 13). All transfers heretofore granted under the Atlanta plan were based upon choice. (Affidavit of Superintendent Letson, infra, p. 14.) Choice was not one of the criteria which were abandoned. (Brief in Opposition, pp. 8-9.) Proximity was not one of the criteria expressly mentioned in the original plan but was recognized

by the District Court, by the respondents, and by petitioners to be a relevant consideration in the assignment and transfer of pupils (R. 212). Atlanta has now adopted a formal policy of applying these criteria in connection with assignments and transfers. (See Resolution of the Atlanta Board of Education, infra, pp. 8-12.)

QUESTION (by Chief Justice Warren):

Has the Negro community been apprised of the mechanics to be followed in applying for initial assignments to the eighth grade and for transfers in the higher grades?

ANSWER:

This question was asked in a context which leads us to believe that what the Chief Justice wanted to know was whether or not the Negro community had been advised as to the plans of the school board relating to assignments and transfers in September, 1964. In response we can only say that there had been a public announcement following the decision of the Circuit Court as to what was left of the Atlanta plan. (See affidavit of Superintendent Letson, infra, p. 13.) The decision of the Circuit Court was widely publicized and was construed by the school board as eliminating all criteria except freedom of choice, availability of facilities, and proximity of schools. (See Affidavit of Superintendent Letson, infra, p. 13.) These were the same criteria urged before the Court on oral argument. For each of the previous years the Negro community had been apprised of how to take advantage of the transfer privilege (R. 63-65, 71). The procedure was printed and made available to the public. (R. 64). In previous years the official action of the Board of Education was made public (R. 64), it was discussed

between the Superintendent and school principals (R. 64-65, 71), and teachers (R. 65), and was discussed over the educational television system (R. 65). It was given wide publicity by newspapers, radio and television (R. 64). It was discussed at Parent-Teacher Association meetings (R. 71). The Superintendent was of the opinion that there was no lack of understanding as to how to apply for transfers (R. 63-64, 71).

QUESTION (by Chief Justice Warren):

When and how will Atlanta solve the present situation with respect to overcrowding whereby some schools are crowded to several times their capacity while others are only half full?

ANSWER:

The respondents freely admit the existence of this situation and concede that the Negro school population suffers more as a result than do the whites, although there is overcrowding with respect to both (R. 105). Overcrowding, however, is not so much a racial problem as a population problem. The enrollment in Atlanta schools has been constantly increasing (R. 101). This increase has consisted almost entirely of Negro children (R. 101, 105). No plan of desegregation, however comprehensive or however fairly administered, can completely solve the problem of overcrowding. Admittedly, desegregation will help and is helping this situation, but the ultimate solution can lie only in additional construction.

QUESTION (by Mr. Justice Stewart):

Does Atlanta *presently* have any administrative prob-

lems which would militate against a more speedy transition toward complete desegregation?

ANSWER:

Since this question is addressed to the situation *presently* existing, it of course can only be answered by going outside the record. The administrative problems which lead to a staggered plan of desegregation were recited in the preamble to the original plan (R. 10-12). Since the existence of these problems was not controverted, the District Court took them as true (R. 19). With respect to the present situation, we can only say that the same problems, including the size of the school system, rapid growth of the community, and shifting populations, continue to exist.

QUESTION (by Mr. Justice Goldberg):

Why did Atlanta not voluntarily start toward desegregation in 1954, and should it be rewarded because it waited to make a start until after a court order which became effective in 1961?

ANSWER:

The answer to these questions must necessarily be more practical than legal. The resistance of the Georgia Legislature, which threatened to cut off funds, the danger of schools being closed, and the successful efforts of the Atlanta community to overcome these obstacles have been stated and reiterated both in the record and in the briefs. (See: Order of District Court of December 30, 1959, R. 29; Order of the District Court of March 9, 1960, R. 43-46; Order of the District Court of September 8, 1960, R. 48-53; Order of the District Court of June

16, 1959, R. 165; Brief in Opposition to Petition for Certiorari, pp. 4, 6; Brief for Respondents, pp. 2, 3; Brief for the State of Georgia as Amicus Curiae, pp. 2, 3.)

QUESTION:

Does Atlanta now have or has it ever had inflexible attendance zones for each school? (This question was raised by several Justices but was perhaps put in best perspective by Mr. Justice White, who asked the precise question whether the District Court made any finding as to the use of attendance lines.)

ANSWER:

The District Court found as follows (R. 158):

> "Neither does the evidence show that defendants are maintaining a 'dual system of school attendance area lines.' Proximity to the schools in question is a factor considered by the defendant Board. It is not shown that defendants are acting arbitrarily in connection with the assignment of pupils in relation to their distance from the school. It does appear that area lines (where such exist) are sometimes changed for the sole purpose of relieving overcrowded conditions in the schools."

On the question of lines the Court of Appeals also found (R. 234) that:

> "He [the School Superintendent] testified that there were no attendance areas or zone lines established by the board, but that lines are sometimes drawn administratively between schools in an attempt to equalize class loads. There was no evidence

before the court that they were based on race. The Atlanta system is divided into five sub-areas with an assistant superintendent in charge of each area. One sub-area has only Negro schools in it, but there is no evidence of white children living in it, or that it resulted from gerrymandering."

In his dissenting opinion Judge Rives challenges these statements (R. 250, Footnote 4). With all deference to Judge Rives and to the District Court, the statement made in the majority opinion in the Circuit Court more correctly states the facts.[1] For administrative purposes, as distinguished from attendance, the school board has divided the City of Atlanta into five administrative areas, each under an area superintendent (R. 234). Atlanta has no "official attendance lines. There are administrative lines drawn by individual schools on occasion to equalize the load in various schools." (R. 61.) "There are no official lines in this city." (R. 98, 99.) (See also R. 104-105.)

RESOLUTION OF THE ATLANTA BOARD OF EDUCATION.

A regularly called meeting of the Atlanta Board of Education was held at the administrative offices of the Board on April 8, 1964. All members of the Board were present.

A report was received from Mr. A. C. Latimer, Mr. Newell Edenfield, and Mr. J. Lee Perry, the attorneys

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[1] A reading of the testimony quoted in footnote 4 of Judge Rives' dissent (R. 250) will reveal that the line of inquiry was with respect to elementary schools which, of course, have not been reached by the plan at this date. (R. 61-62).

who appeared for the Board in the case of Calhoun v. Latimer before the Supreme Court of the United States.

It was reported by the attorneys that at the time of argument the Court was somewhat confused as to exactly what issues were presented for decision, inasmuch as the record in the case was originally made during the 1961-62 school year, and particularly because neither in the record nor elsewhere did it appear what policy was to be followed by the Board in making assignments and granting transfers under the plan of desegregation for the school year 1964-65.

By reason of the foregoing and in the light of certain questions asked by the Justices during argument, the attorneys were requested by the Court to furnish to the Court such documents, minutes or resolutions, or other actions of the Board as would indicate the exact position of the Board on these questions. The attorneys thereupon requested the Board to adopt such a resolution for the benefit of the Court stating unequivocally the present policy of the Board and the factors to be considered by it in making initial assignment of pupils and in permitting transfers for the school year 1964-65.

Upon motion made and seconded, the following resolution was adopted by a unanimous vote:

"BE IT RESOLVED: That for the school year beginning August 24, 1964, all pupils entering the eighth grade from elementary schools be assigned among the various high schools without regard to race, after consideration of the following factors:

1. Choice of the pupil or his parents;

2. Availability of facilities; and

3. Proximity of the school to place of residence.

"BE IT FURTHER RESOLVED: That among those seeking to attend a particular school, where facilities are not available for all, priority shall be based on proximity, except that for justifiable educational reasons and in hardship cases other factors not related to race may be applied. Administrative assignments or reassignments may be made in cases of overcrowding, in hardship cases, and for disciplinary reasons. When such administrative assignments are made they shall be based on relative proximity and available facilities, giving consideration to pupil choice where possible.

"BE IT FURTHER RESOLVED: That in those grades already reached by the Atlanta plan of desegregation (ninth, tenth, eleventh and twelfth grades), transfers be freely granted according to the criteria hereinbefore provided, without formal application, other than the usual pre-registration required of all students.

"BE IT FURTHER RESOLVED: That where a student has exercised his choice of schools, either by initial assignment to the eighth grade or by transfer, as herein provided, further and additional transfers will be permitted only in hardship cases or for valid educational reasons unrelated to race.

"BE IT FURTHER RESOLVED: That a certified copy of this resolution be furnished to the attorneys for transmission to the Supreme Court of the United States in accordance with its direction."

CERTIFICATE

I, Louise Simpson, Secretary of the Atlanta Board of Education, do certify that the within and foregoing constitutes a true and correct transcript of a resolution adopted by the Atlanta Board of Education in regular called session held on the 8th day of April, 1964.

LOUISE SIMPSON,
Secretary.

(SEAL)

AFFIDAVIT OF THE ATLANTA SUPERINTENDENT OF SCHOOLS.

GEORGIA,
FULTON COUNTY

Personally before the undersigned officer authorized to administer oaths appeared JOHN W. LETSON, who, being duly sworn, deposes and says that he is Superintendent of Schools in the City of Atlanta, Georgia, and that he makes this affidavit to be furnished to the Supreme Court of the United States for the purpose of clarifying and eliminating any uncertainty as to what are the present policies of the Atlanta School Board with respect to the assignment and transfer of pupils pursuant to the plan of desegregation originally adopted pursuant to court order in 1959.

Affiant deposes and says that in the opinion of the Court of Appeals for the Fifth Circuit (on petition for rehearing), the Court held:

> "The corrective action necessary in light of the deficiencies will entail the application of the plan in an even handed manner without regard to race to all assignments of pupils new to a school for admission in a desegregated grade in that school; and to all transfers whether formal, informal or otherwise. Personality interviews to determine probable success or failure in the schools to which transfer and assignment is sought may not be utilized where such a practice relates only to Negro pupils as was the case. No standard requiring that a transferee score a grade on scholastic ability and achievement tests equal to the average of the class in the school to which transfer is sought may be utilized, nor may

any scholastic requirement whatever be used where applied only to Negro students seeking transfer and assignment as was the case in Atlanta in the administration of the plan approved by the District Court. The opinion is modified to make it clear that this corrective action must apply to transfers and assignments for the 1963-64 school term to the extent, if any, that the practices giving rise to the deficiencies may have been continued in use."

Affiant further says that upon the rendition of the judgment quoted, it was publicly stated by him, on behalf of the Atlanta Board of Education, that under the decision initial assignments could be made and transfers determined only on the basis of freedom of choice, available facilities, proximity, or other valid educational reasons, not related to race.

Affiant shows that pursuant to the conclusions stated, and in what they conceived to be compliance therewith, the Board caused all previous applications for transfer to be reconsidered and further caused each of said transfers which had been denied to be granted, provided only that the school to which transfer was sought was nearer to the place of residence of the student than the school then attended.

Affiant shows that the foregoing conclusions of necessity would not appear on the record in the Supreme Court of the United States because they represented policies which were and could only have been adopted subsequent to the decision of the Circuit Court on August 16, 1963.

Affiant says further that said policies were publicly reported at the time of the reconsideration of transfer ap-

plications following receipt of the Circuit Court opinion. Administrative regulations were not formulated and distributed because it has always been the policy of the Board since the adoption of the original plan to announce administrative regulations for the assignment and transfer of pupils by a regulation promulgated in the spring of each school year to be effective during the following school year.

With respect to "freedom of choice" as distinguished from "proximity" in making assignments and transfers, affiant shows that such a factor was among those contained in the original plan, that all transfers heretofore granted pursuant to the plan were initiated pursuant to choice, and that for administrative reasons wholly unrelated to race, Atlanta prefers to continue to give recognition to choice, as well as proximity, in making assignments and transfers in the future.

JOHN W. LETSON

Sworn to and subscribed before me this 10th day of April, 1964.

FANNIE R. KNIGHT
Notary Public
Notary Public, Georgia, State at Large.
(SEAL). My Commission Expires Jan. 26, 1966.

Respectfully submitted,

A. C. LATIMER, Attorney for
Atlanta Board of Education

NEWELL EDENFIELD,
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 623

FRED S. CALHOUN, *et al.*,

Petitioners,

—v.—

A. C. LATIMER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' RESPONSE TO THE RESPONDENTS' MEMORANDUM OF FACTS

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Atlanta's Most Recent Plan of Desegregation

Atlanta's most recent school desegregation plan was adopted on April 8, 1964, after oral argument herein which took place March 31, 1964.

April 8, the Atlanta Board of Education adopted a resolution (Respondents' Memorandum, pp. 8-10) setting forth three criteria for assignment in September, 1964, of all students entering one grade, i.e., the 8th grade, which is the first year of high school. These criteria are: (1) choice of the pupil or his parents; (2) availability of facilities; and (3) proximity of the school to place of residence (Respondents' Memorandum, pp. 9-10).

The resolution further provides: ". . . where facilities are not available for all, priority shall be based on prox-

imity." This provision is further qualified: ". . . except that for justifiable educational reasons and in hardship cases other factors not related to race may be applied." In addition, so-called "Administrative assignments or reassignments may be made in cases of overcrowding, in hardship cases, and for disciplinary reasons." The resolution then states: "When such administrative assignments are made they shall be based on relative proximity and available facilities giving consideration to pupil choice where possible" (Respondents' Memorandum, p. 10).

The resolution next provides for students in grades 9, 10, 11, and 12. These are the grades already reached by the grade-a-year pupil assignment plan in operation since September of 1961. In these grades "transfers" are to be "freely granted" according to the three criteria set forth above. No "formal application" is required "other than the usual pre-registration required of all students." (There is no explanation of the pre-registration requirement.) There is no discussion of those not desiring to transfer; presumably they will remain where they are (Respondents' Memorandum, p. 10).

As to students who in September, 1964 will be in grades 8 through 12, the resolution provides for a freezing of assignments. This is effected by the following statement: "That where a student has exercised his choice of schools, either by initial assignment to the eighth grade or by transfer, as herein provided, further and additional transfers will be permitted only in hardship cases or for valid educational reasons unrelated to race" (Respondents' Memorandum, p. 10).

Students in grades 1 through 7, in September, 1964, remain completely segregated, because the grade-a-year plan will have reached only the 8th grade. In these grades, prior

to 1961, there were separate school zone lines for Negro and white elementary schools. "There has been no change in the elementary situation" (R. 61).

Prior to the Court of Appeals' opinion, as the Superintendent testified, students entering high school in Atlanta entered the high school "that had traditionally served that elementary school." This was known as the feeder system. Negro elementary schools would feed into Negro high schools. White elementary schools would feed into white high schools (R. 62-63). The majority of the Court of Appeals believed that the "main thrust or force" of Atlanta's grade-a-year pupil assignment plan would be "in the admission and assignment from elementary to high schools, and to the first grade" (R. 241). It conceived of the plan as superseding the feeder system in that:

> . . . for the school term beginning in September 1964, the plan will lay hold of the feeder system for the first time. This follows from the fact that such factors as are used for assignment and transfer must be used system wide in the assignment and transfer of seventh grade students to the eighth grade since they will be moving from one school to another, elementary to high school. This will remove even the residuum of the dual system from this grade and will rapidly dissipate it from the other high school grades as other succeeding elementary grades reach the eighth grade. (R. 241-242.)

As to the students already in grades 9-12, the majority approved the plan as amended in practice by respondents. This amendment was to apply the criteria of the plan only to Negro students seeking transfers to white schools. The Court of Appeals accepted this amendment of the plan to a transfer plan but required as to grades reached by the

plan that these criteria be applied to *all* transfers (R. 258). In addition, that Court required application of these criteria "to all assignments of pupils new to a school for admission in a desegregated grade in that school" (R. 258). From this flowed the emphasis on the 8th grade, the first year of the high school, and eventually the first grade.

The plan adopted April 8, 1964, which retains the original grade-a-year feature, will reach the first grade in 1971. Then all first grade students will be assigned pursuant to the three remaining criteria. Students in grades two to seven will have had a right to transfer pursuant to the three criteria, having been initially assigned pursuant to the separate zone lines. It will not be until 1977, when the 1971 second grade class reaches the eighth grade, that all pupils in the Atlanta system will have been initially assigned to schools pursuant to non-racial criteria.

The plan adopted April 8, 1964, requires all students who are now in the seventh through the twelfth grades in Atlanta's segregated schools to exercise a choice of schools. To this choice two principal criteria will be applied: availability of facilities and proximity of school to place of residence. The "availability" criterion reserves places in white schools for whites. Negroes can enter white schools if there is room or whites leave. Since this is unlikely, we have an automatic freeze. This points up the necessity for non-racial capacity-related school zones now throughout the entire system. Further, it is not clear whether the "proximity" criterion will permit Negro students who live closer to white schools than whites who are already in attendance to be given priority in assignment to the white school.

As to Negro children who do not elect to go to a white school, and white children who do not elect to go to a Negro

school, there will be no further desegregation in Atlanta, and Atlanta does not advise this Court of any steps it will take to disestablish the dual school system which it established and which remains in existence. Finally, respondents do not shed any more light on their chimerical "present administrative problems" which now prevent them from completely desegregating the Atlanta public school system.

Respectfully submitted,

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Of Counsel

CERTIFICATE OF SERVICE

This is to certify that I have this 22nd day of April, 1964, served a copy of Petitioners' Response to the Respondents' Memorandum of Facts on Attorneys for Respondents, A. C. Latimer, Esq., 1205 Healey Building, Atlanta, Georgia and Newell Edenfield, Esq., 310 Fulton Federal Building, Atlanta, Georgia, by mailing a true copy to each of them at the addresses above via United States mail, air mail special delivery, postage prepaid.

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Attorney for Petitioners